

No. 11585

**United States
Circuit Court of Appeals**

For the Ninth Circuit.

**FRANK HYNES, Regional Director, Fish and
Wildlife Service, Department of Interior,
Appellant,**

vs.

**GRIMES PACKING CO., KADIAK FISHER-
IES COMPANY, LIBBY, McNEILL AND
LIBBY, FRANK McCONAGHY & CO., INC.,
PARKS CANNING CO., INC., SAN JUAN
FISHING & PACKING CO., and UGANIK
FISHERIES, INC.,**

Appellees.

Transcript of Record

In Two Volumes

Volume I

Pages 1 to 288

**Upon Appeal from the District Court of the United States
for the Northern District of California,
Southern Division**

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Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.

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ATTORNEYS OF RECORD

Attorneys for Plaintiffs and Appellees:

MEDLEY & HAUGLAND,

Seattle, Washington,

EDWARD F. MEDLEY,

Seattle, Washington,

FRANK L. MECHEM,

Seattle, Washington,

W. C. ARNOLD,

Seattle, Washington,

BOGLE BOGLE & GATES,

Seattle, Washington,

J. GERALD WILLIAMS,

Anchorage, Alaska.

Attorneys for Defendant and Appellant:

MARVIN J. SONOSKY,

Department of Justice,

Washington, D. C.

HARRY O. AREND,

U. S. District Attorney,

Fairbanks, Alaska,

WM. E. BERRETT,

Assistant U. S. District Attorney,

Fairbanks, Alaska.

In the District Court for the Territory of Alaska

Fourth Division

No. 5505

GRIMES PACKING CO., KADIAK FISHERIES COMPANY, LIBBY, McNEILL & LIBBY, FRANK McCONAGHY & CO., INC., PARKS CANNING CO., INC., SAN JUAN FISHING & PACKING CO., and UGANIK FISHERIES, INC.,

Plaintiffs,

vs.

FRANK HYNES, Regional Director, Fish and Wildlife Service, Department of the Interior,
Defendant.

COMPLAINT FOR INJUNCTION AND OTHER RELIEF

I.

Plaintiff, Grimes Packing Co., hereinafter called Grimes, is the trade name under which O. L. Grimes is doing business with its office and principal place of business at 306 Colman Building, Seattle, Washington, and is in every respect qualified to do business in the Territory of Alaska, and has paid all necessary license taxes required by the Territory of Alaska as a condition of carrying on its business and has filed his annual report for the last calendar year.

Plaintiff, Kadiak Fisheries Company, hereinafter called Kadiak, is a corporation organized and existing under the laws of the State of Washington, with its office and principal place of business at 412 Lowman Building, Seattle, Washington. Kadiak is qualified to do business in the Territory of Alaska, and has paid all necessary license taxes required by the Territory of Alaska, as a condition of doing business and has filed its annual report for the last calendar year.

Plaintiff, Libby, McNeill & Libby, hereinafter called [1*] Libby, is a corporation organized and existing under the laws of the State of Maine, with its office and principal place of business at 57 Exchange Street, Portland, Maine. Libby is qualified to do business in the Territory of Alaska, and has paid all necessary license taxes required by the Territory of Alaska as a condition of doing business and has filed its annual report for the last calendar year.

Plaintiff, Frank McConaghy & Co., Inc., hereinafter called McConaghy, is a corporation organized and existing under the laws of the State of Washington, with its office and principal place of business at 512 Colman Building, Seattle, Washington. McConaghy is qualified to do business in the Territory of Alaska, and has paid all necessary license taxes required by the Territory of Alaska as a condition of doing business and has filed its annual report for the last calendar year.

Plaintiff, Parks Canning Co., Inc., hereinafter called Parks, is a corporation organized and ex-

isting under the laws of the State of Washington, with its office and principal place of business at 309 Colman Building, Seattle, Washington. Parks is qualified to do business in the Territory of Alaska, and has paid all necessary license taxes required by the Territory of Alaska as a condition of doing business and has filed its annual report for the last calendar year.

Plaintiff, San Juan Fishing & Packing Co., hereinafter called San Juan, is a corporation organized and existing under the laws of the State of Washington, with its office and principal place of business at Pier 31, Seattle, Washington. San Juan is qualified to do business in the Territory of Alaska, and has paid all necessary license taxes required by the Territory of Alaska as a condition of doing business and has filed its annual report for the last calendar year. [2]

Plaintiff, Uganik Fisheries, Inc., hereinafter called Uganik, is an Alaska corporation, organized and existing under the laws of the Territory of Alaska, with its office and principal place of business at Pier 31, Seattle, Washington. Uganik is qualified to do business in the Territory of Alaska, and has paid all necessary license taxes required by the Territory of Alaska as a condition of doing business and has filed its annual report for the last calendar year.

II.

Defendant is an officer of the United States of America, residing in Juneau, in the Territory of

Alaska, and can be found within said Territory of Alaska and has been and now is the Regional Director for the Territory of Alaska of the Fish and Wildlife Service of the Interior Department, designated by the Director of said Service to exercise all enforcement powers under the statutes of the United States relating to the fisheries of Alaska, and is sued on account of acts which he immediately intends and threatens to perform under color of law in his official capacity as such Regional Director of the Fish and Wildlife Service.

III.

This action arises under the Act of June 6, 1924, c. 272, 43 Stat. 464, as amended by the Act of June 18, 1926, c. 621, 44 Stat. 752 (U.S.C., Title 48, Sections 221-228), Section 2 of the Act of May 1, 1936, c. 254, 49 Stat. 1250 (48 U.S.C. 358(a) as will more fully appear hereinafter.

IV.-

For the past eighteen years, Grimes has been, and is now engaged in the business, among other things, of fishing for salmon and canning salmon in Alaska. In the course of that business Grimes operates the salmon cannery at Ouzinkie, Alaska, at the north end of Kodiak Island, within the territorial jurisdiction of the Third Division of Alaska, and has operated said cannery for the past eighteen years. The salmon obtained for packing at Grimes Cannery at Ouzinkie are secured from the [3] area contiguous to the cannery, including the area on the western shores of Kodiak Island, between a

point one and three-quarters miles east of Rocky Point on the north and Sturgeon River on the south, as more particularly described hereinafter. Grimes' property in its cannery at Ouzinkie is valued at approximately \$150,000, and it has invested approximately \$250,000 in vessels, tenders, gear, equipment, supplies, and other appurtenances necessary and used and useful in the operation of said cannery. Grimes has expended approximately \$30,000 in preparation for its salmon canning operations during the present season beginning June 1, 1946, and has transported to the cannery at Ouzinkie 42 employees, and has arranged through collective bargaining contracts or otherwise for the services of 51 fishermen.

For the past eight years Kodiak has been, and is now, engaged in the business; among other things, of fishing for salmon and canning salmon in Alaska; and the number of years last past during which each of the remaining plaintiffs has been similarly engaged is as follows:

Libby	7 years
McConaghy	9 years
Parks	12 years
San Juan	20 years
Uganik	24 years

The salmon canneries operated by these companies on Kodiak Island, Alaska, within the territorial jurisdiction of the Third Division of Alaska,

and the number of years last past during which such canneries have been operated are as follows:

Kodiak	Port Bailey Cannery, Port Bailey, Alaska	8 years
Libby	Moser Bay Cannery, Moser Bay, Alaska	7 years ^o
McConaghy	McConaghy Cannery, Town of Kodiak, Alaska	9 years
Parks	Uyak Bay Cannery, Uyak Bay, Alaska	12 years
San Juan	Uganik Bay Cannery, Uganik Bay, Alaska	20 years
Uganik	Uganik Bay Cannery, Uganik Bay, Alaska	24 years

All of the salmon obtained for packing at the canneries [4] operated by the plaintiffs as enumerated and described herein are secured from the area contiguous to said canneries, including the area on the western shores of Kodiak Island between a point one and three-quarters miles east of Rocky Point on the north and Sturgeon River on the south, as more particularly described hereinafter.

The approximate value of the cannery properties, the approximate investments in vessels, tenders, gear, equipment, supplies, and other appurtenances necessary and used and useful in the operation of said canneries, the approximate amounts expended in preparation for its salmon canning operations during the present season beginning June 1, 1946, the number of employees transported to the canneries and the number of fishermen arranged for through collective bargaining contracts or other-

wise for the plaintiffs other than Grimes are as follows:

	Value of Company Property	Invest- ment in Floating Equipment	Pre-Season Expenditures 1943	Number Cannery Em- ployees Tresp. 1943	Number Contract Fisher- men 1943
Kodiak	\$220,000	\$140,000	\$377,000	162	94
Libby	150,000	100,000	140,000	75	40
McConaghy	85,000	45,000	115,000	50	90
Parks	125,000	75,000	200,000	101	100
San Juan	220,000	109,000	208,000	104	45
Uganik	128,000	137,000	167,000	22	15

V.

On May 22, 1943, Harold L. Ickes, Secretary of the Interior, signed Public Land Order 128, the text of which is attached hereto and marked Exhibit A, and incorporated herein by reference. This Order purported to create an Indian reservation at Karluk on Kodiak Island subject to the approval of the Indian and Eskimo residents of the area involved in accordance with Section 2 of the Act of May 1, 1936. [5] It has been announced by officials of the Interior Department that the native residents of the area properly voted their approval on May 23, 1944, in accordance with the 1936 Act. The area defined in the Order of May 22, 1943, embraces some 15 miles of the shore line of Shelikof Strait extending north and south of the mouth of the Karluk River and specifically purports to include adjacent ocean water extending 3,000 feet from the shore line at mean low tide. As thus defined, the reservation embraces an area in which

plaintiffs have for many years operated purse seine boats for salmon fishing.

VI.

Plaintiffs allege that such Public Land Order 128 is invalid as a whole in that no part of the land area involved had been withdrawn by Executive Order and placed under the jurisdiction of the Department of the Interior prior to May 1, 1936, as required by the Act of May 1, 1936, c. 254, Section 2, 49 Stat. 1250 (U.S.C. Title 48, Section 358a). Plaintiffs further allege that the purported inclusion of tide lands and ocean waters within the purported Indian Reservation is wholly illegal, is not authorized by the said Act of May 1, 1936, and is in violation both of Section 2 of the Act of May 14, 1898, c. 299, 30 Stat. 409 (U.S.C. Title 48, Section 411); and of Section 1 of the White Act of June 6, 1924, c. 272, 43 Stat. 464, as amended by the Act of June 18, 1926, c. 621, 44 Stat. 752 (U.S.C. Title 48, Sections 221-225).

Plaintiffs further allege that the asserted illegality of the Indian Reservation purported to have been created by Public Land Order 128, and particularly the illegality of the attempt to include tide lands and ocean waters within any Indian Reservation had, prior to March 22, 1946, been repeatedly called to the attention of officials of the Department of the Interior. [6]

VII.

On March 22, 1946, Oscar L. Chapman, Acting Secretary of the Interior, issued amended Alaska

Fisheries General Regulations, which were published in the Federal Register on March 23, 1946 (11 Fed. Register 3103). Section 208.23(r) provided as follows:

"Sec. 208.23. Waters closed to salmon fishing. All commercial fishing for salmon is prohibited as follows:

"(r) All waters within 3,000 feet of the shores of Karluk Reservation (Public Land Order No. 128, May 22, 1943), beginning at a point on the east shore of Shelikof Strait, on Kodiak Island, latitude 57° 32' 30" N., thence northeasterly along said shore to a point 57° 39' 40".

"The foregoing prohibition shall not apply to fishing by natives in possession of said reservation, nor to fishing by other persons under authority granted by said natives (49 Stat. 1250)."

By said regulations the authority of the Act of June 6, 1924, as amended, referred to hereinafter as the White Act, is asserted as authority for the enforcement of the purported Karluk Reservation.

Section 6 of the White Act of 1924, a measure enacted for the conservation of the fisheries of Alaska, provides summary procedures for its enforcement, including, among other things, the seizure of boats, gear and equipment used in violation of the terms of the fisheries regulations, and the arrest and criminal punishment of individuals who might violate said regulations.

Said White Act further authorizes and empowers defendant, as the Regional Director of the Fish and Wildlife Service for the Territory of Alaska, and defendant has been duly authorized and empowered, to make such arrests of persons and to seize such property, including boats, seines, nets and every other gear and appliance used or employed in fishing, and all fish taken therewith, in violation of regulations issued or purporting to issue under authority of said Act, including specifically the plaintiffs, their employees, boats, gear, and other equipment and appliances used and employed in fishing within the waters purported to have been included within [7] the Karluk Indian Reservation and covered by said subsection 208.23(r) of the Alaska Fisheries General Regulations, as amended on March 22, 1946. Defendant has threatened, and is now threatening immediately to seize the catch of fish and to seize all such boats, gear and equipment of plaintiffs and of their employees which plaintiffs in pursuance of their normal and necessary business operations will utilize in fishing within the waters covered by the provisions of subsection 208.23(r) as included within the purported Karluk Indian Reservation by Public Land Order No. 128.

Plaintiffs allege that the aforesaid subsection 208.23(r) is wholly illegal, is not authorized by any provision of the aforesaid White Act, as amended, and is in flat violation of the proviso in Section 1 of said White Act, as amended, which provides that

“Every such regulation made by the Secretary of the Interior shall be of general appli-

ation within the particular area to which it applies, and that no exclusive or several right of fishery shall be granted therein, nor shall any citizen of the United States be denied the right to take, prepare, cure, or preserve fish or shellfish in any area of the waters of Alaska where fishing is permitted by the Secretary of the Interior."

Plaintiffs allege that the threatened immediate action of defendant is wholly unlawful.

VIII.

Plaintiffs are threatened with an immediate, substantial, and irreparable loss, for which they have no adequate remedy at law, because of defendant's action in closing to them the waters purported to be embraced by the Karluk Indian Reservation and included within said subsection 208.23(r) of the Alaska Fisheries General Regulations, and because of defendant's threatened action in utilizing the enforcement powers, particularly the seizure powers, under said White Act. Profitable operation of plaintiffs' [8] canneries requires that the supply of salmon which in previous seasons they obtained from said waters be available to them and particularly at this time when the seasonal run of salmon in these particular waters constitutes one of the principal sources of supply for their cannery operations. No other replacement source of such salmon for their canneries at Kodiak Island is available to them.

Plaintiffs are threatened with an immediate, substantial, and irreparable loss for which they have no adequate remedy at law, in the event of seizure of the fish which they will and necessarily must obtain from such waters purported to be included in the Karluk Indian Reservation and included within said subsection 208.23(r) of the Alaska Fisheries General Regulations.

Plaintiffs are further threatened with immediate, substantial, and irreparable loss, for which they have no adequate remedy at law, in the event of seizure of their boats, gear, and equipment when and as used in the waters purported to be embraced within the Karluk Indian Reservation and included within the aforesaid subsection 208.23(r) of the Alaska Fisheries General Regulations because in the event of such seizure they will be utterly unable thereafter to utilize such boats and gear and equipment, not only within the waters purported to be embraced within the said Karluk Indian Reservation, but also in all other fishing areas adjacent to their Kodiak canneries and from which they customarily and necessarily fish in order to operate their canneries at Kodiak Island. Seizure of such boats, gear and equipment will substantially result in completely closing down their salmon canning operations at Kodiak Island.

Plaintiffs further allege upon information and belief that because the crews of their seine boats are subject to and now threatened with arrest by

defendant for alleged violation of the [9] aforesaid subsection 208.23(r) of the Alaska Fisheries General Regulations, their fishermen will refuse to enter the waters embraced by said subsection unless immediate relief can be obtained from this Court.

Wherefore, the plaintiffs pray:

1. That process issue against the defendant to answer this bill (but not under oath or affirmation and the benefit whereof is expressly waived by the plaintiffs);

2. That this Court grant plaintiffs a temporary restraining order against defendant from doing any act or thing to carry out any of the provisions of said subsection 208.23(r) of the Alaska Commercial Fishing Regulations for 1946;

3. After notice and hearing enter a preliminary injunction to the same effect;

4. And that upon final hearing this Court enter a final order and decree to the same effect;

5. That upon such final hearing this Court enter an order adjudging and decreeing Public Land Order No. 128 null and void and of no legal effect; and adjudging and decreeing that no reservation created or purported to be created under Section 2 of the Act of May 1, 1936, may lawfully embrace tide lands or ocean waters;

6. That upon such final hearing this Court enter a final order adjudging and decreeing said subsection 208.23(r) of the Alaska Fisheries General Regulation null and void and of no legal effect;

7: And such other and further relief as to this Court may seem meet.

O. L. GRIMES,

d/b/a Grimes Packing Co.,

FRANK McCONAGHY & CO.,
INC.,

PARKS CANNING CO., INC.,

SAN JUAN FISHING &
PACKING CO.,

UGANIK FISHERIES, INC.

By MEDLEY & HAUGLAND,

EDWARD F. MEDLEY,

FRANK L. MECHAM,

W. C. ARNOLD,

J. GERALD WILLIAMS, [10]

KADIAK FISHERIES
COMPANY,

LIBBY, McNEILL & LIBBY.

By BOGLE, BOGLE & GATES,

FRANK L. MECHAM,

W. C. ARNOLD,

EDWARD F. MEDLEY,

J. GERALD WILLIAMS,

Attorneys for Plaintiffs. [11]

State of Washington,
County of King—ss.

O. L. Grimes, being first duly sworn, on oath deposes and says: That he is one of the plaintiffs in the above entitled action; that he makes this verification on his own behalf and upon behalf of all other plaintiffs named, he being duly authorized so to do; that he has read the foregoing complaint and knows the contents thereof, and that the same is true as he verily believes.

O. L. GRIMES.

Subscribed and sworn to before me this 21st day of June, 1946.

[Seal] /s/ ROBERT M. JONES,
Judge of the Superior Court of the State of Washington, in and for King County.

State of Washington,
County of King—ss.

I, Norman R. Riddell, County Clerk of King County and ex-officio Clerk of the Superior Court of the State of Washington for the County of King, do hereby certify that the Honorable Robert M. Jones who has signed the foregoing certificate, is the duly elected and qualified Judge of said Court, and that the signature of said Judge to said certificate is his genuine handwriting.

In Testimony Whereof, I have hereunto set my hand and affixed the Seal of said Court this 21st day of June, 1946.

[Seal] /s/ NORMAN R. RIDDELL,
Clerk. [12]

EXHIBIT A

(Public Land Order 128)

Alaska

Modification of Executive Order Designating
Lands as Indian Reservation

By virtue of the authority contained in the Act of June 25, 1910, c. 421, 36 Stat. 847 as amended by the act of August 24, 1912, c. 369, 37 Stat. 497 (U.S.C., title 43, secs. 141-143), and the act of May 1, 1936, c. 254, 49 Stat. 1250 (U.S.C., title 48, sec. 358a), and pursuant to Executive Order No. 9146 of April 24, 1942; It is ordered, as follows:

1. Executive Order No. 8344 of February 10, 1940, withdrawing Kodiak and other islands, Alaska, for classification and in aid of legislation, is hereby modified to the extent necessary to permit the designation as an Indian reservation of the following-described area;

Beginning at the end of a point of land on the shore of Shelikof Strait on Kodiak Island, said point being about one and one-quarter miles east of Rocky Point and in approximate latitude $57^{\circ} 39' 40''$ N., longitude $154^{\circ} 12' 20''$ W.;

Thence south approximately eight miles to latitude $57^{\circ} 32' 30''$ N.;

Thence west approximately twelve and one-half miles to the confluence of the north shore of Sturgeon River with the east shore of Shelikof Strait;

Thence north easterly following the easterly shore of Shelikof Strait to the place of beginning, containing approximately 35,200 acres.

Exhibit A—(Continued)

2. The area described above and the water adjacent thereto extending 3,000 feet from the shore line at mean low tide, are hereby designated as an Indian reservation for the use and benefit of the native inhabitants of the native village of Karluk, Alaska, and vicinity;

Provided, That such designation shall be effective only upon its approval by the vote of the Indian and Eskimo residents of the area involved in accordance with section 2 of the act of May 1, 1936, supra; And provided further, That nothing herein contained shall affect any valid existing claim or right under the laws of the United States within the purview of that section.

HAROLD L. ICKES,

Secretary of the Interior.

May 22, 1943

(E.R. Doc. 43-9892.; Filed June 19, 1943; 10:58 a.m.)

Civil Action No. A-4164. Filed in the District Court, Territory of Alaska, Third Division, 9:02 a. m., June 24, 1946. M. E. S. Brunelle, Clerk; by A. M. Dolan, Deputy.

[Endorsed]: Filed in the District Court, Territory of Alaska, 4th Div., June 25, 1946. John B. Hall, Clerk. [13]

[Title of District Court and Cause.]

STIPULATION

It is hereby stipulated by and between the above parties that the statements contained in Part I of Plaintiffs' complaint herein are true and correct, as in said complaint alleged.

Dated at Seattle, Wash., this 18th day of October, 1946.

W. C. ARNOLD,

FRANK L. MECHEM;

EDWARD F. MEDLEY,

Attorneys for Plaintiffs.

HARRY O. AREND,

United States Attorney,

Attorney for Defendant.

[Endorsed]: Filed Oct. 23, 1946. [14]

[Title of District Court and Cause.]

ANSWER

The defendant herein, by his attorney of record, answers as follows:

I.

First Defense

The Court is without jurisdiction because the United States is an indispensable party and has not consented to be sued and because the Secretary of the Interior is an indispensable party who has not been sued.

Second Defense

The complaint fails to state a cause of action.

Third Defense

The defendant is without knowledge or information sufficient to form a belief as to the truth of the averments set out in Paragraph I of the complaint and therefore denies the same. [15]

II.

For answer to Paragraph II of the complaint the defendant alleges that he is the Regional Director for the Territory of Alaska of the Fish and Wildlife Service of the Department of the Interior, residing in Juneau, Alaska; that he is a subordinate of the Secretary of the Interior and the Director of Fish and Wildlife and as such exercises the powers of his office subject to the control, supervision and direction of his superiors. The defendant otherwise denies all allegations contained in Paragraph II of the complaint.

III.

Denies the allegations contained in Paragraph III of the complaint.

IV.

Alleges that he is without information sufficient to form a belief as to the truth of the averments contained in Paragraph IV of the complaint and therefore denies the same.

V.

For answer to Paragraph V of the complaint, defendant alleges that Public Land Order No. 128, carving out the Karluk Indian Reservation from the public domain as described in said order, was issued by the Secretary of the Interior on June 9, 1943, and published in the Federal Register of June 22, 1943, at page 8557. Pursuant to the requirements of Public Land Order No. 128, the Indian and Eskimo residents of the area involved properly voted their approval. The allegations of Paragraph V of the complaint are otherwise denied. [16]

VI.

Denies the allegations of the first subparagraph of Paragraph VI of the complaint. Alleges he is without knowledge or information sufficient to form a belief as to the truth of the averments contained in the second subparagraph of Paragraph VI of the complaint and therefore denies the same.

VII.

Admits the allegations of the first subparagraph of Paragraph VII of the complaint concerning the issuance and publication of section 208.23(r) of the Alaska Fisheries General Regulations. Alleges that the defendant is duly authorized and empowered, subject to the control, supervision and direction of his superiors, to enforce the provisions of the White Act and otherwise denies all allegations contained in Paragraph VII of the complaint.

VIII.

Denies the allegations of Paragraph VIII of the complaint.

Wherefore, defendant prays that the temporary injunction heretofore issued be dissolved and the complaint dismissed and that the court award costs to the defendant.

/s/ HARRY O. AREND,
United States Attorney,

/s/ WM. E. BERRETT,
Assistant United States
Attorney,

/s/ MARVIN J. SONOSKY,
Attorney, Department
of Justice,
Washington, D. C.,
Attorneys for Defendant.

[Endorsed]: Filed Aug. 26, 1946. [17]

[Title of District Court and Cause.]

Came W. C. Arnold, representing the plaintiffs; came Harry O. Arend, U. S. District Attorney, and Wm. E. Berrett, Asst. U. S. Attorney, representing the defendant.

The Court having taken under advisement the motion of the defendant to strike certain questions and answers in certain depositions introduced by the plaintiffs and now being fully advised in the premises, it was Ordered that the motion be granted.

The Court having taken under advisement the issues in this cause on October 30, 1946, and now being fully advised in the premises, announced that his decision was in favor of the plaintiffs on all of the issues joined and directed that Findings and Judgment be drawn in accordance therewith; that his Opinion filed in this cause on July 18, 1946, pertaining to the temporary Injunction, was his Opinion pertaining to the Permanent Injunction.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Be It Remembered That on the 28th day of October, 1946, at the hour of ten o'clock a. m., the above entitled cause came on regularly for hearing on the merits for a permanent injunction before the Honorable Harry E. Pratt, Judge of the above entitled Court. Plaintiffs were represented by their attorneys, Edward F. Medley and W. C. Arnold, of Seattle, Washington. Defendant was present in person and was represented by Harry O. Arend, United States Attorney for the Fourth Judicial Division of Alaska, and Wm. E. Berrett, Assistant United States Attorney for said Division.

Plaintiffs and defendant announced readiness for trial. Thereafter the respective parties presented to the Court oral testimony in open Court and testimony by deposition, and rested. At the conclusion of said hearing on October 30, 1946, the Court, after

hearing the arguments of counsel, took said matter under advisement and, on October 31, 1946, having considered the proofs and evidence in said cause and said arguments of counsel, rendered his oral opinion to the effect that he found for the plaintiffs on all issues and that he adopted his written opinion of July 18, 1946, rendered on plaintiffs' Motion for Preliminary Injunction, as the law of this case, and said Court does now, in accordance therewith, make and enter the following

Findings of Fact

I.

That plaintiff, Grimes Packing Co., hereinafter called Grimes, is [19] the trade name under which O. L. Grimes is doing business with his office and principal place of business at 306 Colman Building, Seattle, Washington, and is in every respect qualified to do business in the Territory of Alaska, and has paid all necessary license taxes required by the Territory of Alaska as a condition of carrying on his business, and has filed his annual report for the last calendar year;

That plaintiff, Kadiak Fisheries Company, hereinafter called Kadiak, is a corporation organized and existing under the laws of the State of Washington, with its office and principal place of business at 412 Lowman Building, Seattle, Washington; that Kadiak is qualified to do business in the Territory of Alaska, and has paid all necessary license taxes required by the Territory of Alaska

as a condition of doing business, and has filed its annual report for the last calendar year?

That plaintiff, Libby, McNeill & Libby, hereinafter called Libby, is a corporation organized and existing under the laws of the State of Maine, with its office and principal place of business at 57 Exchange Street, Portland, Maine; that Libby is qualified to do business in the Territory of Alaska, and has paid all necessary license taxes required by the Territory of Alaska as a condition of doing business, and has filed its annual report for the last calendar year;

That plaintiff, Frank McConaghy & Co., Inc., hereinafter called McConaghy, is a corporation organized and existing under the laws of the State of Washington, with its office and principal place of business at 512 Colman Building, Seattle, Washington; that McConaghy is qualified to do business in the Territory of Alaska, and has paid all necessary license taxes required by the Territory of Alaska as a condition of doing business, and has filed its annual report for the last calendar year;

That plaintiff, Parks Canning Co., Inc., hereinafter called Parks, is a corporation organized and existing under the laws of the State of Washington, with its office and principal place of business at 309 Colman Building, Seattle, Washington; that Parks is qualified to do business in the Territory of Alaska, and has paid all necessary license taxes required by the Territory of Alaska as a condition of doing business, and has filed its annual report for the last calendar year: [20]

That plaintiff, San Juan Fishing & Packing Co., hereinafter called San Juan, is a corporation organized and existing under the laws of the State of Washington, with its office and principal place of business at Pier 31, Seattle, Washington; that San Juan is qualified to do business in the Territory of Alaska, and has paid all necessary license taxes required by the Territory of Alaska as a condition of doing business, and has filed its annual report for the last calendar year;

That plaintiff, Uganik Fisheries, Inc., hereinafter called Uganik, is an Alaska corporation, organized and existing under the laws of the Territory of Alaska, with its office and principal place of business at Pier 31, Seattle, Washington; that Uganik is qualified to do business in the Territory of Alaska, and has paid all necessary license taxes required by the Territory of Alaska as a condition of doing business, and has filed its annual report for the last calendar year.

II.

That defendant, Frank Hynes, is an officer of the United States of America, residing in Juneau, in the Territory of Alaska, and was during all the times alleged in the Complaint on file herein, and is now, the Regional Director for the Territory of Alaska of the Fish and Wildlife Service of the Interior Department, designated by the Director of said Service to exercise all enforcement powers under the statutes of the United States relating to the fisheries of Alaska, and was made defendant herein because of acts which, at the time this action

was commenced, he immediately intended and threatened to perform under color of law in his official capacity as such Regional Director of the Fish and Wildlife Service as hereinafter set forth.

III.

That this action arose under the Act of June 6, 1924, c. 272, 43 Stat. 464, as amended by the Act of June 18, 1926, c. 621, 44 Stat. 752 (U.S.C., Title 48, Sections 221-228), Section 2 of the Act of May 1, 1936, c. 254, 49 Stat. 1250 (48 U.S.C. 358(a)), as will more fully appear hereinafter.

IV.

That for the past eighteen years, Grimes has been, and is now, engaged in the business, among other things, of fishing for salmon and canning salmon in Alaska; that, in the course of said business, Grimes operates a salmon cannery at Ouzinkie, Alaska, at the north end of Kodiak Island, within the Territorial jurisdiction of the Third Division of Alaska, and has operated said [21] cannery for the past eighteen years; that the salmon obtained for packing at Grimes cannery at Ouzinkie are secured from the area contiguous to the cannery, including the area on the western shores of Kodiak Island, between a point one and three-quarters miles east of Rocky Point on the north and Sturgeon River on the south, as more particularly described hereinafter; that Grimes' property in his cannery at Ouzinkie is valued at approximately \$150,000.00, and he has invested approximately \$200,000.00 in vessels, tenders, gear, equipment, supplies, and

other appurtenances necessary and used and useful in the operation of said cannery; that Grimes expended approximately \$30,000.00 in preparation for his salmon canning operations during the past season beginning June 1, 1946, and transported to his cannery at Ouzinkie 46 employees, and arranged, through collective bargaining contracts or otherwise, for the services of 51 fishermen;

That for the past eight years Kodiak has been, and is now, engaged in the business, among other things, of fishing for salmon and canning salmon in Alaska; and that the number of years last past during which each of the remaining plaintiffs has been similarly engaged is as follows:

Libby	7 years
McConaghy	9 years
Parks	12 years
San Juan	20 years
Uganik	24 years

That the salmon canneries operated by these companies on Kodiak Island, Alaska, within the territorial jurisdiction of the Third Division of Alaska, and the number of years last past during which such canneries have been operated are as follows:

Kodiak	Port Bailey Cannery, Port Bailey, Alaska	8 years
Libby	Moser Bay Cannery, Moser Bay, Alaska	7 years
McConaghy	McConaghy Cannery, Town of Kodiak, Alaska	9 years
Parks	Uyak Bay Cannery, Uyak Bay, Alaska	12 years
San Juan	Uganik Bay Cannery, Uganik Bay, Alaska	20 years
Uganik	Uganik Bay Cannery, Uganik Bay, Alaska	24 years

That all of the salmon obtained for packing at the canneries operated by the plaintiffs as enumerated and described herein are secured from the area contiguous to said canneries, including the area on the western shores of Kodiak Island between a point one and three-quarters miles east of Rocky Point on the [22] north and Sturgeon River on the south, as more particularly described hereinafter:

That the approximate value of the cannery properties, the approximate investment in vessels, tenders, gear, equipment, supplies, and other appurtenances necessary and used and useful in the operation of said canneries, the approximate amounts expended in preparation for their salmon canning operations during the past season beginning June 1, 1946; the number of employees transported to the canneries and the number of fishermen arranged for through collective bargaining contracts or otherwise for the plaintiffs, other than Grimes, are as follows:

	Value of Company Property	Invest- ment in Floating Equipment	Pre-Season Expenditures 1946	Number Cannery Emp- loyees Tresp. 1946	Number Fisher- men. 1946
Kodiak	\$331,000	\$220,000	\$655,000	247	120
Libby	150,000	100,000	140,000	94	78
McConaghy	85,000	45,000	115,000	50	68
Parks	125,000	75,000	200,000	75	82
San Juan	220,000	109,000	208,000	104	45
Uganik	128,000	137,000	167,000	22	15

V.

That on May 22, 1943, Harold L. Ickes, Secretary of the Interior, signed Public Land Order 128, the text of which is as follows:

(Public Land Order 128)

Alaska

Modification of Executive Order Designating
Lands as Indian Reservation

By virtue of the authority contained in the act of June 25, 1910, c. 421, 36 Stat. 847 as amended by the act of August 24, 1912, c. 369, 37 Stat. 497 (U.S.C., Title 43, Secs. 141-143), and the act of May 1, 1936, c. 254, 49 Stat. 1250 (U.S.C., Title 48, Sec. 358a), and pursuant to Executive Order No. 9146 of April 24, 1942; It is ordered, as follows:

1. Executive Order No. 8344 of February 10, 1940, withdrawing Kodiak and other islands, Alaska, for classification and in aid of legislation, is hereby modified to the extent necessary to permit the designation as an Indian reservation of the following described area:

Beginning at the end of a point of land on the shore of Shelikof Strait on Kodiak Island, said point being about one and one-quarter miles east of Rocky Point and in approximate latitude 57° 39' 40" N., longitude 154° 12' 20" W.;

Thence south approximately eight miles to latitude 57° 32' 30" N.;

Thence west approximately twelve and one-half miles to the confluence of the north shore of Sturgeon River with the east shore of Shelikof Strait;

Thence northeasterly following the easterly shore of Shelikof Strait to the place of beginning, containing approximately 35,000 acres.

2. The area described above and the waters adjacent thereto extending 3,000 feet from the shore line at mean low tide, are hereby [23] designated as an Indian reservation for the use and benefit of the native inhabitants of the native village of Karluk, Alaska, and vicinity;

Provided, That such designation shall be effective only upon its approval by the vote of the Indian and Eskimo residents of the area involved in accordance with section 2 of the act of May 1, 1936, supra: And provided further, That nothing herein contained shall affect any valid existing claim or right under the laws of the United States within the purview of that section.

HAROLD L. ICKES,

Secretary of the Interior.

May 22, 1943

(F.R. Doc. 43-9892; Filed June 19, 1943;
10:58 a. m.)

that said Order purported to create an Indian reservation at Karluk on Kodiak Island subject to the approval of the Indian and Eskimo residents of the area involved, in accordance with Section 2 of the Act of May 1, 1936; that the native residents of said area properly voted their approval on May 23, 1944, in accordance with said 1936 Act; that the area defined in the Order of May 22, 1943, embraces some fifteen miles of the shore line of Shelikof Strait extending north and south of the mouth of the Karluk River and specifically includes adjacent ocean waters extending 3,000 feet from the shore line at mean low tide; that, as thus defined, the reservation embraces an area in which plaintiffs have for many years operated purse seine boats for salmon fishing.

VI.

That plaintiffs have always asserted the illegality of the Indian reservation purported to have been created by Public Land Order 128, and particularly have asserted the illegality of the attempt to include tide lands and ocean waters within any Indian reservation.

VII.

That on March 22, 1946, Oscar L. Chapman, Acting Secretary of the Interior, issued amended Alaska Fisheries General Regulations, which were published in the Federal Register on March 23, 1946 (11 Fed. Register 3103); that Section 208.23(r) provided as follows:

"Sec. 208.23. Waters closed to salmon fishing.

All commercial fishing for salmon is prohibited as follows:

“(r) All waters within 3,000 feet of the shores of Karluk Reservation (Public Land Order No. 128, May 22, 1943), beginning at a point on the east shore of Shelikof Strait, on Kodiak Island, latitude 57° 32' 30" N., thence northeasterly along said shore to a point 57° 39' 40”.

“The foregoing prohibition shall not apply to fishing [24] by natives in possession of said reservation, nor to fishing by other persons under authority granted by said natives (49 Stat. 1250).”

That by said regulations the Act of June 6, 1924, as amended, referred to hereinafter as the White Act, is asserted as authority for the enforcement of the purported Karluk Reservation as applied to the ocean and tidal waters described therein;

That section 6 of the White Act of 1924, a measure enacted for the conservation of the fisheries of Alaska, provides summary procedures for its enforcement, including, among other things, the seizure of boats, gear, and equipment used in violation of the terms of the fisheries regulations, and the arrest and criminal punishment of individuals who might violate said regulations;

That said White Act further authorizes and empowers defendant, as the Regional Director of the Fish and Wildlife Service for the Territory of Alaska, and defendant has been duly authorized and

empowered, to make such arrests of persons and to seize such property, including boats, seines, nets, and every other gear and appliance used or employed in fishing, and all fish taken therewith, in violation of regulations issued or purporting to issue under authority of said Act, including specifically the plaintiffs, their employees, boats, gear, and other equipment and appliances used and employed in fishing within the waters purported to have been included within the Karluk Indian Reservation and covered by said subsection 208.23(r) of the Alaska Fisheries General Regulations, as amended on March 22, 1946; that since March 22, 1946, defendant has continually threatened, except as restrained by Order of this Court, to seize the catch of fish and to seize all boats, gear, and equipment of plaintiffs and of their employees which plaintiffs, in pursuance of their normal and necessary business operations, would utilize in fishing within the waters covered by the provisions of subsection 208.23(r) as included within the purported Karluk Indian Reservation by Public Land Order No. 128;

That plaintiffs have continually asserted since March 22, 1946, that the aforesaid subsection 208.23(r) is wholly illegal, is not authorized by any provision of the aforesaid White Act, as amended, and is in flat violation of the proviso in Section 1 of said White Act, as amended, which provides that:

“Every such regulation made by the Secretary of the Interior shall be of general appli-

cation within the particular area to which it applies, and that no exclusive or several right of fishery shall be granted therein, nor shall any citizen [25] of the United States be denied the right to take, prepare, cure, or preserve fish or shellfish in any area of the waters of Alaska where fishing is permitted by the Secretary of the Interior."

VIII.

That if defendant succeeded in closing to the plaintiffs the waters purported to be embraced by the Karluk Indian Reservation and included within said subsection 208.23(r) of the Alaska Fisheries General Regulations, the plaintiffs would suffer a substantial and irreparable loss for which they would have no adequate remedy at law; that the profitable operation of plaintiffs' canneries requires that the supply of salmon which in previous seasons they obtained from said waters be available to them and particularly during the season for fishing as provided by the regulations set forth in the Alaska Fisheries General Regulations for the year 1946; that the seasonal run of salmon in the particular ocean waters covered by said subsection 208.23(r) constitutes one of the principal sources of supply for the cannery operations of all of said plaintiffs; that no other replacement source of such salmon for their canneries on Kodiak Island is available to them;

That because of said subsection 208.23(r) of the Alaska Fisheries General Regulations, plaintiffs

were threatened with immediate substantial and irreparable loss, for which they would have no adequate remedy at law, in the event of the seizure of their boats, gear, and equipment when and as used in the waters purported to be embraced within the Karluk Indian Reservation and included within the aforesaid subsection 208.23(r) of the Alaska Fisheries General Regulations, because, in the event of such seizure, they would be utterly unable thereafter to utilize such boats and gear and equipment, not only within the waters purported to be embraced within said Karluk Indian Reservation and included within the aforesaid subsection 208.23(r), but also in all other fishing areas adjacent to their Kodiak canneries and from which they customarily and necessarily fish in order to operate their canneries on Kodiak Island; that the seizure of such boats, gear, and equipment would substantially result in completely closing down all salmon canning operations of the plaintiffs on Kodiak Island;

That the crews employed or otherwise utilized by the plaintiffs on their seine boats were subject to arrest by defendant if it had been alleged that they violated the provisions of the aforesaid subsection 208.23(r) of the Alaska [26] Fisheries General Regulations, and that such threat would have resulted in fishermen refusing to enter the waters embraced by said subsection if a temporary restraining order and preliminary injunction had not been issued herein by the above entitled Court as hereinafter set forth, or if the said fishermen had not complied with the terms of said subsection 208.23(r).

IX.

That on June 26, 1946, a Restraining Order was issued in the above entitled matter, which, on July 18, 1946, was followed by the issuance of a Preliminary Injunction herein, which said Preliminary Injunction is in words and figures as follows:

(Title of Court and Cause)

• Preliminary Injunction

“This matter having regularly come before me for hearing on July 8, 1946, pursuant to an order to show cause why a preliminary injunction should not be granted to enjoin and restrain the defendant, Frank Hynes, during the pendency of this action from the commission of certain acts as in the complaint filed in this action are particularly set forth and described, and the Court having on July 9, 1946, heard the application for a preliminary injunction, and having then taken the matter under advisement and directed counsel for the respective parties to submit memoranda of authorities, and the Court having considered the pleadings and the supporting affidavits filed herein and being now fully advised in the premises,

“It Is Hereby Ordered that a preliminary injunction pendente lite be, and the same is hereby granted, enjoining the defendant, Frank Hynes, his agents, servants, employees and attorneys and all persons in active concert and participation with him be and they hereby are

restrained from enforcing or attempting to enforce the restrictive provisions of Section 208.23(r) of the 1946 Alaska Fisheries General Regulations and from seizing any boats, seines, nets or other gear and appliance used or employed in fishing by the plaintiffs in the waters in and adjacent to the Karluk Indian Reservation situated on Kodiak Island, Alaska, three thousand feet seaward from the shore at mean low tide or any fish taken therewith, or from arresting any of plaintiffs' fishermen who carry on fishing operations in said waters.

"It Is Further Ordered that the bond in the amount of \$75,000.00 filed by plaintiffs and approved by the Court in this matter on June 26, 1946, be continued in effect, as in said bond provided, during the pendency of this action.

"Issued July 18, 1946.

HARRY E. PRATT,

Judge, District Court,
Territory of Alaska,
Fourth Division."

X.

That upon obtaining the Restraining Order hereinbefore referred to, the plaintiffs deposited their bond in the above entitled Court in the sum of \$75,000.00, which said bond was continued in effect by order of said Court after [27] the issuance of the Preliminary Injunction herein, said bond being conditioned that the plaintiffs herein shall pay any costs or damages which may be incurred by any

party who is found to have been wrongfully enjoined or restrained; that said bond is dated June 26, 1946, and is signed by all of said plaintiffs and by the General Casualty Company of America as surety thereon; and that said bond is still in full force and effect.

And from the foregoing Findings of Fact, the Court does now make and enter the following

Conclusions of Law

I.

That Public Land Order 128 issued by the Secretary of the Interior on May 22, 1943, and hereinbefore fully set forth in Finding of Fact No. V is invalid insofar as the same purports to cover or embrace the ocean or tidal waters below mean high tide, and particularly the waters in and adjacent to the said Karluk Indian Reservation situated on Kodiak Island, Alaska; extending 3,000 feet seaward from the shore line at mean low tide; that no reservation created or purporting to be created under Section 2 of the Act of May 1, 1936 (49 Stat. 1250), may lawfully embrace ocean waters beyond mean low tide.

II.

That Section 208.23(r) of the Alaska Fisheries General Regulations for the year 1946 promulgated on March 23, 1946, by Oscar L. Chapman, Acting Secretary of the Interior, and published in the Federal Register on March 23, 1946 (11 Fed. Register, 3103), was promulgated by said Acting Secretary of the Interior without authority of law and is null, void, and of no legal effect.

III.

That the Preliminary Injunction heretofore entered in the above entitled cause should be made permanent, and that, upon the entry of the Final Decree herein, the Bond referred to in Finding of Fact No. X should be cancelled and the sureties thereon should be exonerated and discharged.

Done at Fairbanks, Alaska, on this 2nd day of November, 1946.

HARRY E. PRATT,

District Judge.

Due service of the foregoing Findings of Fact and Conclusions of Law, and receipt of a copy thereof, is acknowledged November 2, 1946.

WM. E. BERRETT,

United States Attorney for the Fourth Judicial Division, Alaska.

[Endorsed]: Filed Nov. 2, 1946. [28]

[Title of District Court and Cause.]

PERMANENT INJUNCTION

Be It Remembered That on the 28th day of October, 1946, at the hour of ten o'clock A.M., the above-entitled cause came on regularly for hearing on the merits for a permanent injunction before the Honorable Harry E. Pratt, Judge of the above-entitled Court. Plaintiffs were represented by their attorneys, Edward F. Medley and W. C. Arnold, of Seattle, Washington. Defendant was present in person and was represented by Harry O. Arend, United

States Attorney for the Fourth Judicial Division of Alaska, and by Wm. E. Barrett, Assistant United States Attorney for said Division.

Plaintiffs and defendant announced readiness for trial. Thereafter the respective parties presented to the Court oral testimony in open Court with testimony by deposition, and rested, after which the Court heard arguments by the attorneys for the respective parties. Thereafter said Court, having considered the proofs and evidence in said cause and the arguments of counsel and being fully advised in the premises, made, filed, and entered herein its Findings of Fact and Conclusions of Law. [29]

Now, Therefore, by virtue of the law and the premises,

It Is Hereby Ordered That a permanent injunction be, and the same is hereby, granted, enjoining the defendant, Frank Hynes, Regional Director of the Fish and Wild Life Service, Department of the Interior, his agents, servants, employees, attorneys, and all other persons in active concert and participation with him from enforcing or attempting to enforce the restrictive provisions of Section 208.23(r) of the 1946 Alaska Fisheries General Regulations and from seizing any boats, seines, nets, or other gear and appliance used or employed in fishing by the plaintiffs in the waters in and adjacent to the Karluk Indian Reservation situated on Kodiak Island, Alaska, three thousand feet seaward from the shore at mean low tide or any fish taken therewith, or from arresting any of plaintiffs' fishermen who carry on fishing operations in said waters.

17

It Is Further Ordered That the Bond in the amount of \$75,000.00 filed by plaintiffs and approved by this Court in this matter on June 26, 1946, and continued in effect in accordance with the terms of the Preliminary Injunction issued herein on July 18, 1946, be, and the same is hereby, released and discharged, and that the surety on said bond in like manner be, and is hereby, released, discharged, and exonerated, from all liability except such as has been incurred prior to the date hereof.

Done in Open Court at Fairbanks, Alaska, this 6th day of November, 1946.

/s/ HARRY E. PRATT,
District Judge.

Received Copy Nov. 4th, 1946.

WM. E. BERRETT,
Assistant U. S. Attorney.

[Endorsed]: Filed Nov. 6, 1946. [30]

[Title of District Court and Cause.]

OPINION.

The following order creating an Indian reservation in the waters of Shelikof Straits is attacked as invalid by the plaintiffs in this injunction suit. The order reads:..

“(Public Land Order 128)
Alaska

Modification of Executive Order Designating
Lands as Indian Reservation

By virtue of the authority contained in the

act of June 25, 1910, c. 421, 36 Stat. 847 as amended by the act of August 24, 1912, c. 369, 37 Stat. 497 (U.S.C., title 43, secs. 141-143), and the act of May 1, 1936, c. 254, 49 Stat. 1250 (U.S.C., title 48, sec. 358a), and pursuant to Executive Order No. 9146 of April 24, 1942: It is ordered as follows:

1. Executive Order No. 8344 of February 10, 1940, withdrawing Kodiak and other islands, Alaska, for classification and in aid of legislation, is hereby modified to the extent necessary to permit the designation as an Indian reservation of the following described area: [31]

Beginning at the end of a point of land on the shore of Shelikof Strait on Kodiak Island, said point being about one and one-quarter miles east of Rocky Point and in approximate latitude 57° 39' 40" N., longitude 154° 12' 20" W.;

Thence south approximately eight miles to latitude 57° 32' 30" N.;

Thence west approximately twelve and one-half miles to the confluence of the north shore of Sturgeon River with the east shore of Shelikof Strait;

Thence northeasterly following the easterly shore of Shelikof Strait to the place of beginning, containing approximately 35,200 acres.

2. The area described above and the waters adjacent thereto extending 3,000 feet from the shore line at mean low tide, are hereby design-

nated as an Indian reservation for the use and benefit of the native inhabitants of the native village of Kadiuk, Alaska, and vicinity:

Provided, That such designation shall be effective only upon its approval by the vote of the Indian and Eskimo residents of the area involved in accordance with section 2 of the act of May 1, 1936, supra: And provided further, That nothing herein contained shall affect any valid existing claim or right under the laws of the United States within the purview of that section.

HAROLD L. ICKES,

Secretary of the Interior."

June 9, 1943.

Published in Federal Register of June 22, 1943, page 8557.

The authority mentioned in said order will be examined in detail:

1. Act of June 25, 1910:

This act merely authorizes the President of the United States to withdraw public land for classification, etc.;

2. Act of August 24, 1912:

This merely amends the first mentioned act by substituting for the words "minerals other than coal, oil, and phosphates," the words "metalliferous minerals";

3. Executive Order #9146:

Authorizes the Secretary of the Interior to sign orders creating reservations;

4. Act of May 1, 1936:

It is by virtue of this act that the defendant claims said order was authorized. [32]

It is obvious that the acts and executive order mentioned herein under 1; 2, and 3 will not constitute authority for Order #128.

Therefore, the act of May 1, 1936, will be examined in detail.

Act, of May 1, 1936, 49 Stat. 1250, 48 USCA s. 358A: The parts essential to this examination are:

"That the Secretary of the Interior is hereby authorized to designate as an Indian reservation any area of land * * * together with additional public lands adjacent thereto * * *, or any other public lands which are actually occupied by Indians or Eskimos * * *; provided, * * * reservation shall be effective only upon its approval by * * *, Indian or Eskimo residents thereof * * *; provided further, * * * nothing herein contained shall affect any valid existing claim, location, or entry under the laws of the United States, whether for homestead, mineral, right-of-way, or other purpose whatsoever, or shall affect the rights of any such owner, * * * to the full use and enjoyment of the land so occupied."

The defendant relies on the case of *Alaska Pacific Fisheries versus the United States*, (248 US 78, 1918).

In this case the act of Congress making a reservation for the Metlakahtla Indians withdrew "the body of lands known as Annette Islands." It was interpreted

ted to include the tide waters between the Islands and the land thereunder.

The Court arrived at this conclusion from the special facts of the case.

(248 US 88)

“The purpose of the Metlakahtlans, in going to the islands, was to establish an Indian colony which would be self-sustaining and reasonably free * * *. They were largely fishermen and hunters; * * * and looked upon the Islands as a suitable location * * *, because the fishery adjacent to the shore would afford a primary means of subsistence and a promising opportunity for industrial and commercial development. * * *

(248 US 89)

The Indians could not sustain themselves from the use of the upland alone. The use of the adjacent fishing grounds was equally essential. The Indians naturally looked on the fishing grounds as part of the islands and proceeded on that theory in soliciting the reservation. * * * Evidently Congress intended to conform its action to their situation and needs. * * *

* * *, save for the defendant's conduct in 1916, the statute from the time of its enactment has been treated, as stated in the opinion of the Alaska court, by the Indians and the public, as reserving the adjacent fishing grounds as well as the upland, and that in regulations prescribed by the Secretary of the Interior on February 9, 1915, the Indians are recognized as the only per-

sons to whom permits may be issued for erecting salmon traps at these islands."

It will thus be seen that the Court felt the facts of the particular case justified it in believing that Congress used the word "lands" in a technical legal sense, and not with the usual meaning. [33]

Webster's International Dictionary, Second Edition, defines the usual and legal definitions of the word "land," to be;

1. A solid part of the surface of the earth as distinguished from water constituting a part of such surface, especially from ocean and seas.
2. (Law) Any ground any everything annexed to it by nature, as trees, water, etc.; or by man, as buildings, etc.

Bearing said definitions in mind, and also the long established rule "words in common use are to be given their natural, plain, ordinary, and commonly understood meaning, in the absence of any statutory or well established technical meaning, unless it is plain from the statute that a different meaning was intended, or unless such construction would defeat the manifest intention of the legislature," (59 C.J. p.975), let us see if there is anything to indicate that Congress was using the word "land" in the act of May 1, 1936, with other than its usual and common meaning.

In the Treaty of March 30, 1867, wherein Russia ceded Alaska to the United States, it is provided:

C.L.A. 33, p. 67

"Article III.

The inhabitants of the ceded territory, * * * if they should prefer to remain in the ceded territory, they, with the exception of uncivilized native tribes, shall be admitted to the enjoyment of all the rights, * * * of citizens of the United States, and shall be maintained and protected in the free enjoyment of their liberty, property and religion. The uncivilized tribes will be subject to such laws and regulations as the United States, may from time to time, adopt in regard to aboriginal tribes of that country."

"Article VI.

The cession of territory and dominion herein made is hereby declared to be free and unencumbered by any reservations, privileges, franchises, grants and possessions by * * * any parties, except merely private individual property-holders; * * *

The provision to protect the property of inhabitants other than the uncivilized ones warrants the inference that the uncivilized tribes had no property.

The covenant that the ceded property is free from reservations or possessions, except private property, negatives that the Indian tribes had any reservations or possessions that were binding upon the Russian Government, [34]

In the case of *Johnson and Graham, lessees, vs. McIntosh* (1823) 21 U.S. 240, it states:

(p. 258) "Thus, all the nations of Europe, who have acquired territory on this continent, have asserted in themselves, and have recognized

in others, the exclusive right of the discoverer to appropriate the lands occupied by the Indians."

(p. 259) "The United States, then, have unequivocally acceded to that great and broad rule by which its civilized inhabitants now hold this country. * * *. They maintain, as all others have maintained, that discovery gave an exclusive right to extinguish the Indian title of occupancy. * * *. All our institutions recognize the absolute title of the crown, subject only to the Indian right of occupancy, and recognize the absolute title of the crown to extinguish that right."

The statutes of the United States recognize the actual rights of occupancy of the Indians, but nowhere in the general laws do we find any special or exclusive rights granted to the Indians in the lands under the tide waters of the ocean, or right to fish therein. True, in some of the treaties such special rights were recognized in the tribes in question.

In the act of May 17, 1884 (23 Stat. p. 24) :

Providing a civil government for Alaska, the following is found with reference to Indians:

Section 8. * * * "That the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress:"

Section 12. That the Governor and two persons appointed by the Secretary of the Interior

shall constitute a commission "to examine into and report upon the condition of the Indians residing in said Territory, what lands, if any, should be reserved for their use, * * * what provision shall be made for their education what rights by occupation of settlers should recognized, and all other facts that may be necessary to enable Congress to determine what limitations or conditions should be imposed when the land laws of the United States shall be extended to said district; * * *"

We see that Congress here treated the Indians of Alaska the same as the Indians of the States by recognizing their actual possessions.

It can be presumed that the commission to report upon the Indians pursuant to the act of May 17, 1884, did its duty and that when the act of June 6, 1900, making very comprehensive further provisions for the civil government of Alaska was passed, Congress had such report before it. [35]

Said act, 31 Stat. 330, Sec. 27; 48 U.S.C.A., c. 356; Sec. 292 C.L.A. "33, provides: "

"The Indians * * * shall not be disturbed in the possession of any lands now actually in their use or occupation. * * *

We do not find in said act any recognition of the Indians having any rights to the lands under the seas or to fish exclusively in the sea. It must be presumed then that the report of the commission did not show that any such rights existed in the Indians.

At the same session Congress was preparing the

act of June 6, 1900, for Alaska, it was preparing an act providing for the government of the Hawaiian Islands which had recently been annexed. In the Republic of Hawaii the owners of land abutting upon the sea were permitted to acquire vested fishing rights in the sea.

In the act of Congress "to provide a government for the Territory of Hawaii" (31 Stat. p. 160, approved April 30, 1900), appear the following:

Section 95; 48 U.S.C.A. Section 506:

"All laws of the Republic of Hawaii which confer exclusive fishing rights * * * are hereby repealed and all fisheries in the sea waters of the Territory of Hawaii * * * shall be free to all citizens of the United States, subject, however, to vested rights; but no such vested right shall be valid * * * unless established upon petition filed in a circuit court."

Section 96; 48 U.S.C.A. Section 507:

"If such fishing right was established, the Attorney General * * * may proceed in such manner as may be provided by law * * * to condemn such private right of fishing to the use of the citizens of the United States upon making just compensation."

Congress had in mind the unusual fishing rights enjoyed by the inhabitants of Hawaii, so it is probable inquiry was made as to whether or not the Indians of Alaska had similar rights.

It seems only logical to assume that the absence of any provisions concerning exclusive rights in the na-

tives of Alaska was intentional on the part of Congress and because it believed no such rights existed.

U. S. vs. Ashton, 170 Fed. 509, is as follows:

(Page 517) "Any disposition of proprietary rights in the seashore by the government of the United States, being obnoxious to the firmly established principle that control of the seacoast is an attribute of sovereignty appertaining to the states, could only be valid, if valid at all, by virtue of the exercise of the power vested in Congress to be exercised for the national welfare, * * * [36] For the reasons already stated, the President could not grant shore lands by the making of an executive order designating the tract of land to be held as a reservation * * *"

In *Shively vs. Bowlby*, 152 U.S. p. 1, are the following statements:

(p. 11) "By the common law, both the title and the dominion of the sea, where the tide ebbs and flows, and of all the lands below high water mark, within the jurisdiction of the Crown of England, are in the King. Such waters, and the lands which they cover, either at all times, or at least when the tide is in, are incapable of ordinary and private occupation, cultivation and improvement; and their natural and primary uses are public in their nature, for highways of navigation and commerce, domestic and foreign, and for the purpose of fishing by all the King's subjects.

(p. 13) "It is equally well settled that a grant from the sovereign of land bounded by the sea,

or by any navigable tide water, does not pass any title below high water mark, unless either the language of the grant, or long usage under it, clearly indicates that such was the intention.

(p. 14) The common law of England upon this subject, at the time of the emigration of our ancestors, is the law of this country. * * *

In *Mann vs. Tacoma Land Company*, 153 U.S. 273, it is stated:

(p. 284) * * * It is settled that the general legislation of Congress in respect to public lands does not extend to tide lands. There is nothing in the act authorizing the Valentine scrip, or in the circumstances which gave occasion for its passage, to make an exception to the general rule. It provided that ~~the~~ scrip might be located on the unoccupied and unappropriated public lands, but the terms "public lands" does not include tide lands. As said in *Newhall v. Sanger*, 92 U.S. 761, 763: "The words 'public lands' are habitually used in our legislation to describe, such as are subject to sale or other disposal under general laws."

In *United States vs. Holt Bank*, 270 U.S. 49, it is stated:

(p. 55) * * * But, as was pointed out in *Shively v. Bowlby*, pp. 49, 57-58, the United States early adopted and constantly has adhered to the policy of regarding lands under navigable waters in acquired territory, while under its sole dominion, as held for the ultimate

benefit of future States, and so has refrained from making any disposal thereof, save in exceptional instances when impelled to particular disposals by some international duty or public exigency. It follows from this that disposals by the United States during the territorial period are not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain.

In Section 2 of the Act of May 14, 1898, 30 Stat. p. 409, 48 U.S.C.A. 411, Sec. 186 C.L.A. 33, Congress definitely expressed its policy toward Alaska with reference to tide waters:

*** That nothing in this act *** contained shall be construed as impairing in any degree the title of any State that may hereafter be erected out of the Territory of Alaska, or any part thereof, to tide lands and beds of any of its navigable waters, or the right of such state to regulate the use thereof, nor the right of the United States to resume possession of such lands, it being declared that all such rights shall continue to be held by the [37] United States in trust for the people of any State or States which may hereafter be erected out of said Territory. ***

In the first section of the White Act, approved June 6, 1924, 43 Stat. 464, 48 U.S.C.A. 222, following authority to the Secretary of the Interior to create fishing areas and make rules and regulations therefor is found this limitation, to wit:

*** Provided, That every such regulation made by the Secretary of Interior shall be of general application within the particular area to which it applies, and that no exclusive or several right of fishery shall be granted therein, nor shall any citizen of the United States be denied the right to take, prepare, cure, or preserve fish or shellfish in any area of the waters of Alaska where fishing is permitted by the Secretary of the Interior. ***

Section one of the White Act, though reenacted without change (44 Stat. 752), has never been expressly repealed or amended except to substitute the Secretary of the Interior for the Secretary of Commerce (53 Stat. 1433).

If the Act of May 1, 1936, gives the Secretary of the Interior the right to make an area of the sea into an Indian Reservation, it thereby impliedly amends the White Act by giving an exclusive right of fishery to the Indians and by denying to citizens of the United States the right to take fish in an area of water in Alaska where fishing is permitted by the Secretary of the Interior.

The rule of statutory construction is of long standing that no implied amendments or repeals will be adjudged except where clearly expressed and where no other reasonable interpretation can be made. Surely, such cannot be said to be the situation with reference to the act of May 1, 1936.

In the case of *Freeman vs. Smith* (CCA 9th), 44 Fed. 2nd, p. 703, the Territorial law required a \$250 license fee from nonresident fishermen as against a

\$1 fee for resident fishermen. An action was brought to enjoin the Territorial Treasurer from enforcing said law and the Court said, after holding that the license fee was prohibitive:

(p. 704) * * * It will thus be seen that the right to take, prepare, cure, or preserve fish or shellfish in any area of the waters of Alaska, where fishing is permitted by the Secretary of Commerce, is guaranteed to every citizen of the United States without reservation, whether he be a resident of Alaska or not; and the right so granted cannot be impaired or destroyed by the legislative assembly of the territory. If it can, the grant is an idle and empty one at best." [38]

As the nonresident's fishing license law of Alaska was thus held to be invalid because its effect was one prohibited by the White Act, this case becomes strong authority for holding that the act of the Secretary of the Interior (L.O. 128), is equally invalid as it has the effect of destroying the right of plaintiffs and many other citizens of the United States to fish in the portion of the Pacific Ocean described in said order.

As the White Act guarantees the right of fishing without reservation, equally to a nonresident as to a resident, it must give the same guarantee equally to a white man as to an Indian, and thus makes it impossible for the Secretary of the Interior to prohibit fishing in an area by white men by making it an Indian reservation.

That the White Act merely expresses the common law in prohibition against exclusive fishing rights is shown by 36 U.S., p. 837 and 838.

"As a general rule all the members of the public have a common and general right of fishing in public waters, such as the sea and other navigable or tidal waters, and no private person can claim an exclusive right to fish in any portion of such waters, except insofar as he has acquired such right by grant or prescription, as discussed in section 9, *infra*."

To interpret the word "land" as used in the act of May 1, 1936, as including the water of the ocean, would be of the following effect to wit:

- a. It would be contrary to the settled policy and law of the United States.
- b. It would be contrary to the common law and to the common law interpretation of that term.
- c. It would be in violation of the statutory rules of construction.
- d. It would make the act change the common law and violate the rule that statutes in derogation of the common law should be strictly construed.
- e. It would make said act an implied amendment of the White Act contrary to the rule of statutory construction.
- f. It would convert said act of May 1, 1936, into something not intended by Congress. [39]
- g. It would unsettle many property rights and illegally deprive persons of their property.

From all of the above, it appears that the word "land" as used in said act of May 1, 1936, had the usual meaning and that neither said act nor any other act of Congress authorized the Secretary of the Inte-

prior to make Land Order 128 as far as it refers to the waters of Shelikof Strait.

As to the Fishery Regulation of March
22, 1946:

Said regulation is as follows:

Chapter I, Fish and Wildlife Service

Department of the Interior

Sub-Chapter Q, Alaska Commercial Fisheries,

Part 201

(Alaska Fishery General Regulation)

Section 208.23. Waters closed to Salmon fishing.

(r) All waters within 3,000 feet of the shores of Karluk Reservation (Public Land Order No. 128, May 22, 1943), beginning at a point on the east shore of Shelikof Strait, on Kodiak Island, latitude 57° 32' 30" N., thence northeasterly along said shore to a point 57° 39' 40". The foregoing prohibition shall not apply to fishing by natives in possession of said reservation, nor to fishing by other persons under authority granted by said natives."

Published in Federal Register, March 23, 1946.

As the shores of the Karluk Reservation on Kodiak Island are the lands between low and high tide of the waters of Shelikof Strait (*Borax Con. v. Los Angeles*, 296 U.S. 10), the prohibited area of this fishing regulation is identical with the area of water of said strait included in said land Order 128.

Counsel for defendant contends that even if the matters contained in the last paragraph of said fishing regulation are invalid, the regulation will nevertheless be sustained as one prohibiting any fishing whatsoever, as the first sentence so provides. [40]

While it is true that the Secretary of the Interior can, in the aid of the conservation of fish, absolutely close said area to fishing by anyone, it is clear that he did not do so. Said regulation must be viewed in its entirety. It leaves the right of fishing in the natives and their licensees and prohibits all others from fishing. It results in granting exclusive rights of fishing to the natives and their licensees; a thing that was explicitly prohibited by Section One of the White Act.

That the regulation is not in aid of conservation appears from the fact that it does not limit in any way the quantity of fish which the Indians may take, nor does it limit the number of licenses they may issue, nor the number of fish that the licensees may take, nor the prices that the Indians may charge for issuing licenses.

Said fishing regulation is contrary to the common and statutory law, and therefore is invalid, under the authorities cited herein above.

Indispensable Parties Defendant:

That the United States and, or, the Secretary of the Interior are not indispensable parties defendant and that an injunction lies against the defendant

in a case where an invalid regulation or order is the source of the defendant's authority, see:

Colorado v. Toll, 268 U.S. 228;

Yarnell v. Hillsboro Packing Co., 70 Fed. 2nd 435;

Berdie v. Krutz (CCA 9th), 75 Fed. 2nd 898;

Neher v. Harwood (CCA 9th), 128 Fed. 2nd 846.

That officers acting under invalid regulations are subject to restraint by injunction, see also:

Ex Parte Young, 209 U.S. 123;

International News v. Associated Press, 248 U.S. 215;

Stark v. Wickard, 321 U.S. 288;

United States v. Morgan, 307 U.S. 183;

Philadelphia Co. v. Stimson, 223 U.S. 605.

This cause came on for hearing upon the plaintiffs' complaint and affidavits, and upon the defendant's response to the order to show cause why a temporary injunction pendente lite should not be issued and affidavits in support thereof. [41]

From the law and facts as they appear to the Court, the plaintiffs are entitled to an injunction restraining the defendant during the pendency of this action as prayed for in their complaint. Said injunction shall be issued upon the bond heretofore filed in this case on the 26th day of June, 1946, and said bond shall be approved and continued as to any damages or costs arising by reason of said temporary injunction pendente lite.

Done at Fairbanks, Alaska, this 18th day of July,
1946.

HARRY E. PRATT,

District Judge.

[Endorsed]: Filed July 18, 1946. [42]

[Title of District Court and Cause.]

PETITION FOR ALLOWANCE OF APPEAL

The above named defendant, Frank Hynes, considering himself aggrieved by the Order of this Court made and entered in the above entitled action on the 6th day of November, 1946, in favor of the above named plaintiffs and against the said defendant wherein it was ordered and adjudged that the issues joined in said cause are found in favor of the plaintiff and against the said defendant and a Permanent Injunction ordered enjoining the defendant Frank Hynes, Regional Director of the Fish and Wildlife Service, Department of the Interior, his agents, servants, employees, attorneys, and all other persons in active concert and participation with him from enforcing or attempting to enforce the restrictive provisions of Section 208-23(r) of the 1946 Alaska Fisheries General Regulations and from seizing any boats, seines, nets or other gear and appliance used or employed in fishing by the plaintiffs in the waters in and adjacent to Karluk Indian Reservation situate on Kodiak Island, Alaska, 3,000 feet seaward from the shore at mean low tide, or any fish taken therefrom or

from arresting any of plaintiffs' fishermen who carry on fishing operations in said waters, does hereby appeal from said Order, and the whole thereof, to the United States Circuit Court of Appeals for the Ninth Circuit for the reasons specified and set forth in the Assignment of Errors which is filed herewith, and the defendant prays that this appeal may be allowed and that a transcript of the record, proceedings and papers upon which the said Judgement and Order were made, duly authenticated by the Clerk of this Court, may be sent to the [43] United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California;

And the defendant, Frank Hynes, respectfully represents that this suit has been brought against him in his official capacity as Regional Director, Alaska Fish and Wildlife Service, Department of the Interior of the United States of America, to restrain him from enforcing regulations promulgated by the Department of the Interior of the United States of America and that this appeal is directed in his behalf by the Department of Justice of the United States of America and that hence no appeal bond or other bond should be required of him.

Dated at Fairbanks, Alaska, this 27th day of January, 1947.

/s/ HARRY O. AREND,

/s/ WM. E. BERRETT,

Attorneys for Defendant.

[Endorsed]: Filed Jan. 28, 1947. [44]

[Title of District Court and Cause.]

ASSIGNMENT OF ERRORS

Comes now the above named defendant and alleges that the findings and Order of the above entitled Court entered in the above entitled cause on the 6th day of November, 1946, is erroneous and unjust to him, and files with his petition for allowance of appeal the following assignment of errors on which he will rely, to-wit:

1.

The Court erred in taking jurisdiction of the above entitled matter without the United States of America and the Secretary of the Interior being named parties defendant in said cause.

2.

The Court erred in admitting as evidence over the defendant's objection Plaintiffs' Exhibit B, the same being a letter in words and figures as follows:

United States
Department of the Interior
Office of the Solicitor
Counsel at Large
Juneau, Alaska

July 4, 1944

"Kadiak Fisheries,
412 Lowman Bldg.,
Seattle, Wash.
Gentlemen:

"According to information received from competent witnesses, your boats numbered 8,

120, 122 and 123 fished illegally between June

July 6

16 and June 6 within the restricted area of the Karluk Indian Reserve established by authority of the [45] act of Congress of May 1, 1936, 48 U.S.C.A. 358a. Since you are undoubtedly aware of the serious sanctions applicable in cases of this kind, it is presumed that this was done without your knowledge or consent. Accordingly, before requesting the law enforcement officers of the federal government to take action, I should like to know whether you propose to take any measures to prevent a repetition of this offense by any of your boats.

Very truly yours,

/s/ GEORGE W. FOLTA,

Counsel at Large,

the proceedings in relation thereto being as follows:

"Mr. Arnold: At this time, if the Court please, I would like to offer the document marked Plaintiffs' Exhibit 3 in the deposition of Mr. Bailey in evidence as Plaintiffs' Exhibit B in in this case.

"Mr. Berrett: Your Honor, we object to the admission of this document in evidence, purporting to be a letter from George W. Folta, counsel at large for the Department of the Interior, on July 4, 1944. It bears no relationship to the defendant Hynes and no relationship to any provisions in the fisheries regulations. We object to it as being incompetent, irrelevant, and immaterial in this action.

"The Court: Objection overruled. It may be admitted." (Transcript of Testimony, pages 27-28.)

3.

The Court erred in admitting as evidence, over the defendant's objection, Plaintiffs' Exhibit G, the same consisting of two sheets, one an application for permission to fish in the Karluk Reservation, the other an ordinance showing what the license was to be and what the penalty would be in case of noncompliance, both bearing date of 1945, the same being in words and figures as follows:

"An Ordinance

"Whereas, under Public Land Order 128, of May 22, 1943, creating the Karluk Reservation, the right to fish commercially in the waters of said reservation is restricted to the inhabitants of the Native Village of Karluk and vicinity and;

"Whereas, non-residents desire to continue their fishing operations in the waters of said reservation;

"Now, Therefore, be it ordained by the Council of the Native Village of [46] Karluk, a federal corporation chartered under the Act of June 18, 1934, as amended;

"Section 1. That it shall be unlawful for any person, partnership, firm, association or corporation, to fish for, take or catch any fish, or to operate any fishing vessel, gear or equipment, within the waters of the Karluk Reser-

vation except under a permit issued by the Native Village of Karluk, for which the fee shall be as follows:

“(A) For residents of the Territory of Alaska \$ 1.00

“(B) For non-residents of the Territory of Alaska 25.00

“Provided further, that a person to qualify for a resident (Class A) permit must have resided in the Territory of Alaska for three consecutive years prior to the date of their application, or request, for a permit.

“Section 2. The possession of fish upon any vessel within said waters without a permit shall constitute prima facie evidence of a violation of this ordinance.

“Section 3. Any violation of this ordinance shall be punished by a fine of not exceeding Five Hundred Dollars (\$500).

“Section 4. This ordinance shall take effect and be in force from and after the 31st day of May, 1945.

Approved this 31st day of May, 1945.

/s/ JACOB LAKTONEN, SR.,

Sect. & Treas. Native Village of Karluk, Alaska

/s/ LARRY ELLANAK,

President Native Village of Karluk, Alaska”

"Application for 1945

Commercial Fishing Permit

Karluk Reservation, Alaska

I,

(Name) (Address)

hereby make application for () resident,
() non-resident, permit to fish in the waters
of the Karluk Reservation, Alaska, in com-
pliance with an Ordinance passed by the Native
Council of the Village of Karluk dated May
31, 1945, copy of which has been furnished me.

.....
Date

.....
Applicant's Signature

My boat number or name is

I am fishing for

"Name and address of packer or cannery".

the proceedings in relation thereto being as follows:

"Mr. Arnold: At this time we offer Plain-
tiffs' Exhibit 8, consisting of two sheets in the
deposition as Plaintiffs' Exhibit 8 in this case.

"Mr. Berrett: We object to this admission,
your Honor, because it is an ordinance of an
Indian village that is not a defendant in this
case, an application prepared by them which
in no wise is connected with the fishing regula-
tions. It was not included in the fishing regu-
lations in 1945. The defendant in this case,
Mr. Hynes, had nothing to do with its promul-
gation and nothing to do with its enforcement.

by agent. I contend it is immaterial in this action.

“Mr. Arnold: If the Court please, no objection was made to the document at the time it was offered. No objection was made at the time the document was offered. In fact, counsel stated that the defendant had no objection to its introduction. Now, passing on to its relevancy, it is the same type of testimony objection was made to previously and the same point that was argued this morning. It is our contention that what happened there in 1944 and 1945 is relevant to this controversy, since it shows the cumulative effect of the pressure in these continued threats by various members of the Department of the Interior and its agencies to preclude the plaintiff companies from fishing in the area. It culminated in 1946, it is true, in the issuance of the fisheries’ regulations and the efforts of defendant Hynes, but we contend that what went on before that and those steps that were taken or were prompted by the Department of the Interior or its agencies, the Office of Indian Affairs, and others is relevant to this controversy, as showing the background or circumstances which existed there at the time this injunctive relief was applied for.

“The Court: Objection overruled. It may be admitted.” (Transcript of Testimony, pages 92-94.)

4.

The Court erred in refusing to admit in evidence a document marked Defendant's Identification E, the same being a telegram as follows:

"From Department of the Interior
Bureau Fish and Wildlife Service
Chicago, Illinois, May 28, 1946.

Radio Routine [48]

"Thompson

Fish and Wildlife Service

Juneau, Alaska

"Sending Chaney copy yours May twenty five to secure his opinion advisability Karluk test case recommended by Folta, also what personnel this Service should do toward enforcement Regulation 208.23R.

WARD T. BOWER."

the proceedings in relation thereto being as follows:

"Mr. Berrett: At this time, your Honor, I offer in evidence what is marked as Defendant's Identification E and ask that it be received in evidence.

"Mr. Arnold: I object to the introduction of the document upon the grounds it is incompetent, irrelevant, and immaterial.

"The Court: Objection sustained." (Transcript of Testimony, page 246.)

The Court erred in refusing to admit in evidence document marked Defendant's Identification ~~F~~, the same being a telegram as follows:

"Fish & Wildlife Svc

"From Hynes Fish and Wildlife Service

Juneau Alaska June 4 1946

to Mark Meyer Fish and Wildlife Service

Kodiak Alaska

"Bower has directed that no action be taken to arrange friendly suit involving enforcement Regulation 208.23 R therefore disregard instructions my wire May twenty fifth stop Bower advises further instructions entire Karluk matter will be issued stop You will be notified immediately upon receipt such instructions",

the proceedings in relation thereto being as follows:

"Mr. Berrett: At this time, your Honor, I would like to offer in evidence what is marked for identification as Defendant's Exhibit F.

"Mr. Arnold: If the Court please, we object to receipt of the exhibit in evidence on the ground, first, that it is a communication from one officer of the Fish and Wildlife Service to another and not relevant to this controversy, and, second, upon the further ground that it isn't shown that any of the plaintiffs or their agents had notice of it.

"The Court: Objection sustained." (Transcript of Testimony, page 249.) [49]

6.

The Court erred in refusing to admit in evidence a document marked Defendant's Identification G, the same being a telegram as follows:

"From Department of the Interior
Bureau Fish and Wildlife Service
Chicago, Illinois, June 3, 1946.

"Radio Routine

Thompson

Fish and Wildlife Service

Juneau, Alaska

Chaney says hopes test case recommended by Folta for June one did not occur stop He said employees this Service should await further instructions entire Karluk matter.

WARD T. BOWER."

the proceedings in relation thereto being as follows:

"Mr. Berrett: At this time, your Honor, I offer in evidence what is marked as Defendant's Identification G.

"The Court: Show it to the adverse counsel, please.

"Mr. Arnold: If the Court please, we object to the introduction of the exhibit on the ground that it is an interagency communication, not relevant to this controversy, and upon the further ground that there is no showing that the plaintiffs or their agents had knowledge of it.

"The Court: Objection sustained." (Transcript of Testimony, page 250.)

The Court erred in refusing to admit in evidence a document marked Defendant's Identification H, the same being a signed copy of a letter as follows:

“United States
Department of the Interior
Office of the Solicitor
Washington 25, D. C.

June 5, 1946.

“Dear Mr. Arnold:

“This letter is designed to confirm the arrangements made; in the course of the various conversations between certain representatives of the industry and of the Department of the Interior between May 13 and May 21, with respect to the Karluk reservation on Kodiak Island.

“1. The industry intends to test the validity of the Departmental action in including the off-shore waters to a distance of 3,000 feet from shore and the [50] Department is willing to cooperate in obtaining such a test in the courts. The course of the litigation will take any of the following three forms:

“2. The industry may bring suit to enjoin enforcement, either in Washington or in Alaska. Upon notification of such a desire the Department will issue formal notice of an intention to enforce the reservation under Sec. 208.23(r) of the Alaska Commercial Fishing Regulations for 1946. The notice will be signed, according to the locale of the

proposed suit, by the Secretary or by the Regional Director for Alaska of the Fish and Wildlife Service. The Government, subject to the concurrence of the Department of Justice, will not interpose procedural objections which would foreclose a decision on the merits in such a suit nor will it challenge the industry's standing to sue; it will, however, be at liberty to make any use it chooses of related arguments on the merits, such for example as the discretion of the Secretary and the absence of vested rights in the public domain.

"If such a suit be brought, the industry agrees to devote its best efforts to avoid fishing in the path of native beach-seining operations within the outer limits of the reservation during the course of the litigation. The Department, on the other hand, prior to a decision in its favor will not, during the course of this litigation, enforce the regulation against such fishing in Karluk waters as does not interfere with beach-seining. If any preliminary or interlocutory injunction be issued, the parties will endeavor to see that its terms follow this understanding.

"3. Whether or not an injunction suit be brought by the industry, the Department will enforce the regulations against any fishing in the path of the beach-seining operations, and will institute proceedings (in Alaska or on the West Coast as may seem appropriate) against any person or boat and gear that so interfere with beach seining.

"4. If by September 1, no litigation has been

commenced under either of the above two paragraphs, the Department (on its own motion or on request of the industry) will consider the desirability of enforcing the regulation as against persons who fish in the reservation waters but do not actively interfere with beach-seining.* In such event arrangements will be made with the industry for a test proceeding, to be prosecuted on the West Coast. The industry agrees, in the event of such proceeding by the United States, to refrain from any procedural contentions which would, if successful, prevent a decision upon the merits.

"5. For purposes of this agreement, the litigation will be considered [51] terminated upon final decision, either after argument or by denial of a petition for a writ of certiorari, by the Supreme Court of the United States.

"Whatever form the litigation may take, both parties agree to use their best efforts to stipulate the facts to the fullest extent possible.

"This letter is not a binding or carefully drawn contract between the parties, but is merely an informal statement of the general intentions of the Department and of the industry. If you accept this understanding, please sign the enclosed carbon copy and return it to me for our files.

Sincerely yours,

/s/ WARREN W. GARDNER

Solicitor.

The above Statement of Intentions is agreed to:

.....
Mr. W. C. Arnold,
Alaska Salmon Industry, Inc.,
Dexter Horton Building,
Seattle, Washington.

Copies to:

Commissioner Brophy, Indian Office
Mr. Chaney, Fish and Wildlife Service
Don C. Foster, Juneau, Alaska
Theodore H. Haas, Juneau, Alaska
Louis C. Mueller, Juneau, Alaska
Frank W. Hynes, Juneau, Alaska
Thomas H. Austern, Washington, D. C.”

the proceedings in relation thereto being as follows:

“Mr. Berrett: Your Honor, at this time I would like to introduce in evidence a copy of a letter addressed to Mr. Arnold, counsel in this case for the plaintiffs, from the solicitor of the Department of the Interior, Mr. Warren W. Gardner.

“Mr. Arnold: If the Court please, we object to receipt of the exhibit in evidence upon the grounds, first, that it is not the best evidence; it purports to be a copy of the original sent to the defendant Hynes, as an interagency communication; no proper foundation has been laid for the introduction of the copy, no proof of loss of the original, nor proof of inability to obtain the original; no request for the production of the original has been served. We object upon the further ground that the contents of the letter are not relevant to this controversy. An

examination of the document will show that it [52] was written by the solicitor of the Department of the Interior, and it was addressed to me in my capacity as an executive of the Alaska Salmon Industry, Incorporated. It has to do with the discussion and arrangements relative to a friendly suit or a test suit to test the validity of the order establishing the Karluk Reservation and the power of the Fish and Wildlife Service to enforce. The negotiations or exchange of correspondence, since it did not culminate in an arrangement, becomes *functus officio*, the same as the negotiations preliminary to the drafting of the contract, or the same as the evidence sought to be introduced for the purpose of showing offers of compromise, or anything of that kind. It merely amounts to preliminary conversation or exchange of correspondence which did not culminate in an arrangement, and we object to it on that ground, upon both grounds.

"The Court: May I see it?"

"Mr. Berrett: Your Honor, in regard to this, I would like to demand that the plaintiffs, at this point, produce the original or be willing that the copy of the original be introduced into evidence, it being manifestly not within our power to produce the original in this case.

"The Court: We have a court rule that you must demand anything you want from an adverse party early, not at the last minute.

"Mr. Berrett: Our claim for this letter, your Honor, is not that these negotiations resulted in the suit that was proposed, but that these negotiations

were responsible for the sending of Exhibit 4 of the plaintiffs to Mark Meyer, which they have deemed a threat and is explanatory of that telegram, being addressed to the plaintiffs themselves. They are fully aware of its contents:

"Mr. Arnold: If I may be permitted, in response to counsel's statement, I should like to point out that the letter was neither sent by the defendant Hynes, nor addressed to the defendant Hynes. It is merely a copy of a letter from the solicitor of the Department of the Interior to myself.

"The Court: Objection sustained." (Transcript of Testimony, pages 251-253.) [53]

8.

The Court erred in refusing to admit in evidence a document marked Defendant's Identification 1, the same being a telegram as follows:

"From Interior Dept Washington DC 1421382
To Govt Interior Frank T Hynes
Regional Director Fish & Wildlife Svc
Juneau Alaska

"My letter June 5 to Arnold and other re Karluk test case accepted by industry period Therefore prepare and send out over your signature letters to all individuals and companies most likely fishing vicinity Karluk reading quote Your attention is directed to the provisions of the regulations for the protection of the commercial fisheries of Alaska as amended March 23 1946 11 FR 3103 period A copy of these regulations is enclosed and your attention par;

particularly is directed to subsection /R/ which has been added to Section 208.23 period This new subsection prohibits all salmon fishing except by natives in possession of the reservation and by other persons under authority granted by said natives comma within 3000 feet of the shores of Karluk Reservation paragraph Full compliance with the provisions of the new subsection referred to comma as well as with all other provisions of the regulations and of the laws affecting the commercial fisheries of Alaska comma is required of you period The new regulation as well as the others will be enforced in accordance with the provisions of laws authorizing the regulation of the commercial fisheries of Alaska comma which may include the seizure of boats comma gear comma and appliances used or employed in violation of the regulations and of fish taken therein or therewith unquote Airmail list and addresses to whom letters sent/Warren W. Gardner/.

the proceedings in relation thereto being as follows:

"Mr. Berrett: Your Honor, I wish to offer in evidence what is marked as Defendant's Identification I.

"Mr. Berrett: If the Court please, we object to the introduction of the exhibit upon the ground it is an interagency communication irrelevant to this controversy, and upon the further ground that there is no showing that the plaintiffs had notice of the dispatch of such communication or of the contents of it.

"The Court: Objection sustained." (Transcript of Testimony, page 254.) [54]

9.

The Court erred in refusing to admit in evidence a document marked Defendant's Identification J, the same being a file letter as follows:

••Via Airmail

Mr. Seton Thompson

Fish and Wildlife Service

Cordova, Alaska

Dear Seton:

"This morning we received copy of Warner W. Gardner's letter of June 5th to Mr. Arnold in regard to the Hydaburg, Klowack, and Kake Native committees' aboriginal claims and the matter of trespass on the Karluk Reservation. Am also enclosing copies of Mr. Bower's airmail memorandum to you dated June 11, 1946, and his memorandum to Donald J. Cheney of June 6th.

"While I am sure you have seen all of this correspondence before, it might be a good idea for you to have an extra copy along in case of emergency.

"I had a letter from Dan Bates yesterday which indicated that while he was by no means anxious to take on the Cook Inlet assignment, he would do so in order to help us out of a tight spot. No doubt that you have already discussed the matter with him and told him we would like to have him in Anchorage as soon after the 15th of this month as possible since Burns is leaving on that date.

"I talked with Earl Bright on the radio-telephone this morning and he informed me that the Brant would be delayed a couple of days beyond the 18th due to the bad weather conditions now prevailing there in Seattle which prevented completion of painting and other outside work until that time. He and Bert Johnson are coming North via Pan American on the 19th and expect to fly to Anchorage on the 22nd. Earl said he had arranged to transport Agent Roy Lindsley's wife, two children and household furnishings from Seattle direct to Craig on the Brant.

"Howard Baltze returned to Juneau last night from his Icy Strait crab investigation and reported that all operations had ceased out there, including that of the Woods Canning Company. Mr. Baltze said that he had been unable to collect very much worthwhile information in regard to the numbers of soft-shelled crab and moulting crabs taken in the period since May 15th. Some of the fishermen told him that in the Dundas Bay Region, especially, moulters could be found at almost any season of the year.

"Since beginning this letter a wire came in from Warner W. Gardner which [55] I quote:

"From Interior Department Washington DC
To Government Interior Frank W. Hynes Regional Director Fish and Wildlife Service
Juneau, Alaska

"My letter June five to Arnold and others re Karluk Test Case accepted by industry period

Therefore prepare and send out over your own signature letters to all individuals and companies most likely fishing vicinity Karluk reading quote Your attention is directed to the provisions of the regulations for the protection of the commercial fisheries of Alaska as amended March 23, 1946, 11 FR 3103 period A copy of these regulations is enclosed and your attention particularly is directed to Subsection (R) which has been added to Section 208.23 period This new subsection prohibits all salmon fishing except by natives in possession of the reservation and by other persons under authority granted by said natives comma within 3000 feet of the shores of Karluk Reservation paragraph.

For your compliance with the provisions of the new subsection referred to comma as well as with all other provisions of the regulations effecting the commercial fisheries of Alaska comma is required of you period The new regulation as well as the others will be enforced in accordance with the provisions of laws authorizing the regulation of the commercial fisheries of Alaska comma which may include the seizure of boats comma gear comma and appliances used or employed in violation of the regulations and of fish taken therein or thereby unquote Airmail list and addresses to whom letters sent."

"We are now in process of preparing these letters to be sent out to all of the companies engaged in commercial fishing near Kodiak area, to Mark Meyer and to leaders of the fishermen's organizations there.

"Also during the course of dictating this letter, I had a call from Mr. Dan Foster, Mr. Mueller and Mr. Brunskill. You will recall that Messrs. Mueller and Brunskill are going to be at Kodiak as Acting Deputy Fishery Management Agents with power to enforce the fishing regulations there. Mr. Mueller, who was at Kodiak last summer and spent a good deal of his time around Karluk, wanted my [56] opinion as to whether it would be a good idea to contact W. C. Arnold and request him to have industry members in that region instruct their seine boat skippers to interfere as little as possible with the fishing of the Karluk beach seine pending final settlement of the issue of Native rights on that reservation. I told him that while no doubt Mr. Arnold himself would be more than willing to go along with him in the matter, and probably most of the industry members would also, it would be hard to say how much compliance could be had from the fishermen who are extremely independent and not in very great sympathy with the idea of the reservation.

"All three of these gentlemen appeared to be very sure that Native rights would be upheld in the Supreme Court if the cases go that far.

"Will keep you advised of further developments.

FRANK W. HYNES,
Regional Director."

FWH:jeh

the proceedings in relation thereto being as follows:

"Mr. Berrett: At this time, your Honor, I would like to offer in evidence what is marked

as Defendant's Identification J, previously referred to here as the letter from Mr. Thompson to Mr. Hynes, on this date, June 14.

"Mr. Arnold: I object to the receipt of the exhibit in evidence upon the ground that it is an interagency communication not relevant to this controversy, and on the further ground that there is no showing that the plaintiffs or their agents had knowledge of the communication, and upon the further ground that the principal part of the letter is the quotation of a telegram, which is Defendant's Identification I, which has previously been offered and rejected.

"The Court: Objection sustained." Transcript of Testimony, pages 257-258).

10.

The Court erred in refusing to admit in evidence a document marked Defendant's Identification K, the same being a telegram as follows:

"ID Washington DC June 14 1946 553 PM

Frank T Hynes

Regional Director Fish and Wildlife Service
Juneau Alaska [57]

"On advice of Department of Justice based on objection to agreement incorporated in my letter to Arnold dated June 5 comma please disregard my telegram of today suggesting that you send out letters with respect to enforcement of Karluk fishing regulations period Alternative mode of litigation being considered periled.

Warner W Gardner Solicitor of the Int."

the proceeding in relation thereto being as follows:

“Mr. Berrett: I wish to offer at this time in evidence what is marked as Defendant’s Identification K.

“Mr. Arnold: We object to the exhibit being received in evidence upon the ground that it is an interagency communication; it isn’t relevant to this cause; and upon the further ground that there is no showing that the plaintiffs or their agents have knowledge of it.

“The Court: Objection sustained.” (Transcript of Testimony, pages 258-259).

11.

The Court erred in refusing to admit in evidence documents marked Defendant’s Identification P-1, P-2, P-3, P-4, P-5, P-6, P-7 and P-8, the same being duplicate originals of fishing permits issued to fishing boats of the several plaintiff companies for Karluk waters during the 1946 fishing season, the proceedings in relation thereto being as follows:

“Mr. Berrett: At this time, your Honor, I want to offer in evidence what is marked as Defendant’s Identification P-1, P-2, P-3, P-4, P-5, up to 8.

“The Court: Show them to the adverse counsel.

“Mr. Berrett: They are copies of the permits issued.

“Mr. Arnold: If the Court please, we object to the receipt of the exhibits in evidence upon the grounds, first, that no proper foundation has

been laid. It has not been shown that this witness has any official capacity with the village of Karluk or is the custodian of the records of Karluk. We object upon the further ground that the plaintiffs in this case are not bound by the permits, they appearing on their face to be documents simply [58] issued by the village of Karluk or some officer of the village of Karluk. We object upon the further ground that they are immaterial and outside of the issues of this case. Our contention is that our right to fish in these waters is not dependent upon the permission granted or withheld by the village of Karluk or the officials of the Karluk village, and it is our position that these exhibits that are offered have no proper connection with this case, and that no proper foundation has been laid for their receipt. It does not appear whether they are originals or duplicates. No effort has been made to establish their introduction as secondary evidence or to explain the location of the originals, if these are not the originals.

“The Court: Objection sustained.” (Transcript of Testimony, pages 294-295).

12.

The Court erred in rejecting defendant's second offer to introduce in evidence documents marked Defendant's Identifications P-1, P-2, P-3, P-4, P-5, P-6, P-7 and P-8, the proceedings in relation thereto being as follows:

“Mr. Berrett: Your Honor, I wish to offer

again, in evidence Defendant's Identification P-1 through to 8.

"Mr. Arnold: If the Court please, could I interrogate this witness briefly on this matter?

"The Court: Well, do you have any objection to the offer?

"Mr. Arnold: Oh, yes, I have. I beg your pardon.

"The Court: On the same grounds as before?

"Mr. Arnold: Yes.

"The Court: I will sustain the objection." Transcript of Testimony, page 296).

13.

The Court erred in rejecting defendant's third offer to introduce in evidence documents marked Defendant's Identification P-1 through P-8, the proceedings in relation thereto being as follows:

"Mr. Arend: We offer these identifications once more.

"Mr. Arnold: We renew our objection upon the grounds [59] previously stated.

"The Court: Objection sustained." (Transcript of Testimony, page 300).

14.

The Court erred in sustaining plaintiff's objection to the question put by defendant to his witness, W. G. Brunskill, in direct testimony as to what orders he had received in regard to enforcing the fisheries regulations in question, the proceedings in relation thereto being as follows:

"Q. What were you told to do?

“Mr. Arnold: I object to that, if the Court please, as irrelevant and immaterial and outside of the issues of this case.

“The Court: Objection sustained.” (Transcript of Testimony, page 302).

15.

The Court erred in sustaining plaintiff's objection to the following question put by defendant to his witness, Mr. Brunskill, on direct examination, the proceedings in relation thereto being as follows:

“Q. Did you ever observe a boat of any of the plaintiffs fishing in those waters for which you did not see a permit in the files of the village?

“Mr. Arnold: I object to that upon the grounds that it is irrelevant and immaterial and outside of the issues of this controversy.

“The Court: Objection sustained.” (Transcript of Testimony, page 307).

16.

The Court erred in sustaining plaintiff's objection to the question put by the defendant in direct examination to defendant's witness Brunskill, the proceedings in relation thereto being as follows:

“Q. (By Mr. Berrett): Did you observe any boat that was fishing without a permit?

“Mr. Arnold: I object to that upon the grounds previously stated, and on the further ground it is repetitious.

“Mr. Berrett: Your Honor, in the complaint of

the plaintiffs they have alleged that they were suffering irreparable damage and they were in danger of losing their boats and gear and that because of threats of arrest their fishermen were not willing to go within [60] the waters of the reserve. Now, there couldn't be any threats of arrest if all of the fishermen fishing there had permits. Now, I think that it is proper for us to show through this type of questioning and evidence that there were no threats of arrest and there was no danger of seizure of gear or equipment, because there was no boat fishing there without a permit. They couldn't be seized; they couldn't be arrested. Now, if that is not permissible, it certainly would then be incumbent upon the plaintiffs to have shown the names of the boats and the skippers and to have furnished considerable evidence that some boat was in danger, and, of course, they have not done that.

“Mr. Arnold: If the Court please, this case is at issue on the situation that existed there on the 24th of June, 1946, when this proceeding was commenced. What this witness did after that—did or failed to do—is immaterial, and the question of whether or not these fishermen had permits issued by the native village of Karluk is immaterial; our contention being that efforts of the village of Karluk to establish rules and regulations in regard to fishing on this reserve are invalid and of no effect; and, insofar as the permits are concerned, we contend it is immaterial whether the fishermen held them or didn't hold them. The purpose of this examination apparently is to show that this witness was not enforcing the

ordinances or regulations of the village of Karluk. We contend that that is immaterial. Judge Medley calls my attention to the fact that on the government's theory of this case, if these people violated any of the general regulations either of the village of Karluk or of the Fish and Wildlife Service, they can be prosecuted. The fact that he didn't arrest them still didn't make them immune from arrest.

"The Court: It seems that it would be entirely consistent with the plaintiffs' case that none of their fishermen would be in that area because they would be afraid they would be arrested. I will sustain the objection." (Transcript of Testimony, pages 307-309).

17.

The Court erred in refusing a continuance of the trial upon the request of [61] the defendant until the proposed witness, Mr. Mark Meyer, could have arrived by plane, the proceedings in relation thereto being as follows:

"Mr. Berrett: Your Honor, I wish to ask for a continuance at this time, inasmuch as the plane from Anchorage on which our last witness was to have come has not arrived. We have been attempting all morning to get word as to just what hour the plane might leave Anchorage, and we have not received that word. It did not leave at its usual hour. We don't suppose that it would be in this morning from that information. We propose, your Honor, by the introduction of the testimony of this witness, who is Frank Meyer, who is the Fish and Wildlife Agent in the Kodiak region, of which Karluk is one place—we

propose to show by his testimony that the industry, the plaintiff companies, had full knowledge of the orders that Mr. Meyer had received; first, to enforce and make a test case, and next not to enforce; that he showed to their agents communications which have been marked here for identification purposes but not admitted as exhibits. We propose to show that general knowledge, in order to establish that the plaintiffs were in no danger whatsoever of loss of property in regard to enforcement of this regulation, and, after laying the foundation with Mr. Meyer, I will again present as exhibits those particular identifications consisting of communications between Mr. Hynes, the defendant in this action, and Mr. Meyer.

“Mr. Arnold: If the Court please, we are very reluctant to withhold our cooperation from the government in the trial of this case. We have all lived in this country a long time and know that transportation schedules are uncertain at best, particularly at this time of the year, although this case has been set for a long time. Mr. Medley and myself and our witnesses came from a great distance, and they have arrived. But, from counsel's own statement, I do not see that a continuance is justified, because I cannot see that the missing witness, the testimony outlined by counsel's statement to be furnished by Mr. Meyer, is admissible or relevant or material to this controversy. What I am trying to say, if the Court please, is that we are reluctant to resist the continuance in this matter, if a material witness is absent, but [62] based upon counsel's own statement, I fail to see the materiality of the evidence of the witness, Mark

Meyer, and I do not think any foundation or any basis has been made upon which the Court ought to grant the continuance.

“Mr. Medley: I would like to present, if I may, a new thought there, your Honor. It is a well, old, established rule of the law that no agent of the government can bind the government by the statement that he will not prosecute or enforce a regulation. There have been many cases where such a statement has been made, and the proof of that has been objected to and the objection sustained, on the theory that an agent of the government cannot bind the government in such a manner. I have had the unfortunate experience of being thrown out of court on that theory myself, and I am quite familiar with it; and, therefore, so far as the possibility of the prosecution of those fishermen for fishing in that reserve is concerned, any statement of anybody who has been a witness or suggested as a witness is absolutely immaterial, insofar as the possibility of prosecution is concerned.

“Mr. Berrett: If the Court please, I want to refer to paragraph eight in the complaint of the plaintiffs in which they themselves raise this issue and which we denied in our answer. I think, having raised the issue that they were immediately threatened—“Plaintiffs are threatened with an immediate, substantial, and irreparable loss, for which they have no adequate remedy at law, because of defendant’s action in closing to them the waters purported to be embraced by the Karluk Indian Reservation and included within said subsection 205.23 (r) of the Alaska

Fisheries General Regulations, and because of defendant's threatened action in utilizing the enforcement powers, particularly the seizure powers, under said White Act. Profitable operation of plaintiffs' canneries requires that the supply of salmon which in previous seasons they obtained from said waters be available to them and particularly at this time when the seasonal run of salmon in these particular waters constitutes one of the principal sources of supply for their cannery operations. No other replacement source of such salmon for their canneries at Kodiak Island is available to them.

"Plaintiffs are threatened with an immediate, substantial and [63] irreparable loss for which they have no adequate remedy at law, in the event of seizure of the fish which they will and necessarily must obtain from such waters purported to be included in the Karluk Indian Reservation and included within said subsection 208.23 (r) of the Alaska Fisheries General Regulations.

"Plaintiffs are further threatened with immediate, substantial, and irreparable loss, for which they have no adequate remedy at law, in the event of seizure of their boats, gear and equipment when and as used in the waters purported to be embraced within the Karluk Indian Reservation and included within the aforesaid subsection 208.23 (r) of the Alaska Fisheries General Regulations because in the event of such seizure they will be utterly unable thereafter to utilize such boats and gear and equipment, not only within the waters purported to be embraced within the said Karluk Indian Reservation, but also in all

other fishing areas adjacent to their Kodiak canneries and from which they customarily and necessarily fish in order to operate their canneries at Kodiak Island. Seizure of such boats, gear and equipment will substantially result in completely closing down their salmon canning operations at Kodiak Island.

"Plaintiffs further allege upon information and belief that because the crews of their seine boats are subject to and now threatened with arrest by defendant for alleged violation of the aforesaid subsection 208.23 (r) of the Alaska Fisheries General Regulations, their fishermen will refuse to enter the waters embraced by said subsection unless immediate relief can be obtained from this Court."

"I think, having raised it themselves in their complaint and it having been denied in the answer, that it has become an issue and it is before the Court.

"The Court: Motion denied." (Transcript of Testimony, pages 313-317).

18.

The Court erred in finding that there was an imminent threat or danger to the person or property of the plaintiffs sufficient to justify injunctive relief.

19.

The Court erred in considering the validity of Public Land Order 128 [64] issued by the Secretary of the Interior May 22, 1943, in a suit in which the United States and the Secretary of the Interior have not been made parties defendant.

20.

The Court erred in its conclusion that no reservation created or purporting to be created under Section 2 of the Act of May 1, 1936 (49 Stat. 1250) may lawfully embrace open waters beyond mean low tide.

21.

The Court erred in its conclusion that Section 208.23 (r) of the Alaska Fisheries General Regulations for the year 1946 promulgated on March 23, 1946, by Oscar L. Chapman, Acting Secretary of the Interior, was promulgated by said Acting Secretary of the Interior without authority of law and is null, void and of no legal effect.

22.

The Court erred in giving and entering a judgment to the effect that the issues joined in said cause by the plaintiffs and defendants are found in favor of the plaintiffs and against the defendant.

23.

The Court erred in giving and entering an order in favor of the plaintiffs and against the defendant permanently enjoining the defendant, his agents, servants, employees, attorneys, and all other persons in active concert and participation with him from enforcing or attempting to enforce the restrictive provisions of Section 208.23 (r) of the 1946 Alaska Fisheries General Regulations and from seizing any boats, seines, nets or other gear and appliances used or employed in fishing by the plaintiffs in the

waters in and adjacent to the Karluk Indian Reservation situate on Kodiak Island, Alaska, 3,000 feet seaward from the shore at mean low tide, or any fish taken therewith, or from arresting any of the plaintiffs' fishermen who carry on fishing operations in said waters.

Wherefore defendant prays that said judgment, findings and order be set aside and the injunction dismissed in furtherance of justice and in accordance with law.

Dated at Fairbanks, Alaska, this 27th day of January, 1947.

/s/ HARRY O. AREND,

/s/ WM. E. BERRETT,

Attorneys for Defendant.

[Endorsed]: Filed Jan. 28, 1947. [65]

[Title of District Court and Cause.]

ORDER ALLOWING APPEAL

Now on the 3rd day of Feb., 1947, the same being one of the days of the General March 1946 Term of this Court, this cause came on regularly to be heard upon the Petition of the defendant above named for the allowance of an appeal in behalf of said defendant from the findings and Order entered in said cause on the 6th day of November, 1946; and whereas the defendant, Frank Hynes, is an authorized agent of the Government of the United States and no cost bond is required;

Now, therefore, it is Ordered that the appeal of said defendant from the Order entered herein on November 6, 1946 be, and is, hereby allowed to the United States Circuit Court of Appeals for the Ninth Circuit and that a certified copy of the transcript of record, proceedings, orders, and all other proceedings in said matter on which said Order appealed from is based, be transferred, duly authenticated, to the United States Circuit Court of Appeals for the Ninth Circuit and therein filed and said cause docketed on or before forty (40) days from this date to be heard at San Francisco, California, or such other place within the Ninth Circuit as may be designated.

Dated this 3rd day of Feb., 1947.

JOSEPH W. KEHOE,
District Judge.

Lodged Jan. 28, 1947. John B. Hall, Clerk.

Filed in the Office of the Clerk of the District Court of the Territory of Alaska, Second Division, at Nome Feb. 3, 1947. Norvin W. Lewis, Clerk.

[Endorsed]: Filed in the District Court; Territory of Alaska, 4th Div., Feb. 11, 1947. John B. Hall, Clerk [66]

[Title of District Court and Cause.]

CITATION ON APPEAL

The President of the United States of America,
To the above named plaintiffs, Grimes Packing
Co., Kadiak Fisheries Company, Libby, McNeill &
Libby, Frank McConaghy & Co., Inc., Parks Can-
ning Co., Inc., San Juan Fishing & Packing Co.,
and Uganik Fisheries, Inc., and their attorneys:

Medley & Haugland, 1011 American Building,
Seattle 4, Washington.

Bogle, Bogle & Gates, 603 Central Building, Seat-
tle 4, Washington.

W. C. Arnold, 682 Dexter Horton Building, Seat-
tle 4, Washington.

Greeting:

You are hereby cited to be and appear in the
United States Circuit Court of Appeals for the
Ninth Circuit to be holden in the City of San Fran-
cisco, State of California, or at such other place
within the Ninth Circuit as may be designated by
the Court, within forty (40) days from the date of
this citation pursuant to an Order Allowing an Ap-
peal made and entered in the above entitled action
on this day in which the above named defendant is
defendant and appellant and the above named plain-
tiffs are plaintiffs and appellees, to show cause, if
any there be, why the Judgement and Order ren-
dered in said cause on the 6th day of November,
1946, in favor of the plaintiffs and against the de-
fendant and appellant herein should not be cor-

rected, set aside and reversed and why speedy justice should not be done to said [67] defendant and appellant above named in that behalf.

Witness the Honorable Fred M. Vinson, Chief Justice of the Supreme Court of the United States of America, on this 3rd day of Feb., one thousand nine hundred and forty-seven and of our Independence one hundred seventy-first.

Attest my hand and the seal of the above named District Court on this the 3rd day of Feb., 1947.

/s/ JOSEPH K. KEHOE,

District Judge.

Lodged Jan. 28, 1947. John B. Hall, Clerk.

Filed in the Office of the Clerk of the District Court of the Territory of Alaska, Second Division, at Nome, Feb. 3, 1947. Norvin W. Lewis, Clerk.

Filed in the District Court, Territory of Alaska, 4th Div., Feb. 11, 1947. John B. Hall, Clerk. [67]

[Title of District Court and Cause.]

ACKNOWLEDGMENT OF SERVICE

Service by receipt of certified copies of the following pleadings filed in the District Court for the Territory of Alaska, Fourth Judicial Division, in the above entitled matter is hereby acknowledged and accepted:

Petition for Allowance of Appeal.

Assignment of Errors.

Order Allowing Appeal.

Citation on adverse party.

Petition for Extension of time in which to
File Bill of Exceptions.

Order Extending Time in Which to File Bill
of Exceptions.

Dated this 17th day of Feb., 1947.

MEDLEY & HAUGLAND,
By EDWARD F. MEDLEY,
Of Counsel for all
Plaintiffs and Appellees.

[Endorsed]: Filed Feb. 20, 1947. [69]

[Title of District Court and Cause.]

MOTION FOR EXTENSION OF TIME IN
WHICH TO SERVE AND FILE PRO-
POSED BILL OF EXCEPTIONS.

Comes now the defendant Frank Hynes, by his
counsel, Harry O. Arend, United States Attorney,
and William E. Berrett, Assistant United States
Attorney in and for the Fourth Judicial Division
of Alaska, and for the causes set forth by affidavit
attached hereto and made a part hereof moves the
Court for an Order extending the time in which
defendant may serve and file proposed Bill of Ex-
ceptions until May 15th, 1947.

Dated at Fairbanks, Alaska, this 19th day of De-
cember, 1946.

/s/ HARRY O. AREND,

United States Attorney,

/s/ WM. E. BERRETT,

Assistant U. S. Attorney. [70]

[Title of District Court and Cause.]

AFFIDAVIT OF WM. E. BERRETT

United States of America,
Territory of Alaska—ss.

Wm. E. Berrett, first being duly sworn, respectfully presents and sets forth the following:

1. That he is one of the attorneys, counsel for the defendant Frank Hynes in the matter of Grimes Packing Co. et al. vs. Hynes, previously tried on the merits in this Court.

2. That on November 6th, 1946, a Judgement and Order was entered in this Court in the above entitled matter based upon the evidence and argument of a trial upon the merits which said Order permanently enjoined the defendant from enforcing Section 208.23(r) of the Alaska Fisheries General Regulations, and from seizing any boats, seines, nets or other gear employed in fishing by the plaintiffs in the waters in and adjacent to the Karluk Indian Reservation, 3,000 feet seaward from the shore at mean low tide.

3. That thereafter a request was immediately made by the defendant to the Court Reporter for a transcript of testimony so that defendant might determine from a perusal thereof whether or not to appeal to the Circuit Court of Appeals.

4. That to date said transcript has not been received and a Bill of Exceptions has not been prepared.

5. That affiant, as counsel for defendant, is now informed that the Honorable Harry E. Pratt, Judge of this Court, will be absent from this Judicial [71] District on and after December 20, 1946; for the greater part, if not all, of the ninety (90) day period allowed by the statutes for the filing and allowing of a Bill of Exceptions, and may be absent for a further extended period of time on official duties and hence will not be available to examine and allow a Bill of Exceptions, if prepared.

6. That the transcript of testimony is so voluminous and the questions of law so involved as to cause and undue burden to be placed upon any other Judge of the District of Alaska before whom a Bill of Exceptions might legally be presented.

7. That defendant requires an extension of time until May 15, 1947, in order to properly prepare and file a proposed Bill of Exceptions before this Court and receive allowance therefor.

WM. E. BERRETT.

Subscribed and sworn to before me this 19th day of December, 1946.

[Seal]

HARRY O. AREND,

Notary Public in and for Alaska.

My commission expires 9/30/50.

[Endorsed]: Filed Dec. 16, 1946. [72]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO FILE PROPOSED BILL OF EXCEPTIONS AND FIXING TIME FOR FILING OBJECTIONS THERETO.

This matter coming on for hearing upon the motion of Frank Hynes by his counsel that the time for said defendant to prepare, serve and file proposed Bill of Exceptions in the above entitled cause be extended to and including May 15, 1947, and the Court being fully advised,

It is hereby Ordered that the time for said defendant to prepare, serve and file proposed Bill of Exceptions in the above entitled cause be, and the same is hereby, extended to and including May 15, 1947, and it is further Ordered that the above named plaintiffs have fifteen (15) days from the date of filing said proposed Bill of Exceptions to serve and file objections thereto.

Dated at Fairbanks, Alaska, this 19th day of December, 1946.

HARRY E. PRATT,
District Judge.

[Endorsed]: Filed Dec. 19, 1946. [73]

[Title of District Court and Cause.]

BILL OF EXCEPTIONS

This cause came on for hearing in equity before the Honorable Harry E. Pratt, Judge of the above-entitled court, at a session held at Fairbanks, Alaska, in the Fourth Judicial Division of said Territory, on the 29th day of October, 1946; the plaintiffs were represented by their attorneys of record, Edward F. Medley and W. C. Arnold, both of Seattle, Washington, and the defendant was present in person and represented by United States Attorney Harry O. Arend, and Assistant United States Attorney William E. Berrett, both of Fairbanks, Alaska.

Whereupon, the parties respectively offered and introduced the following evidence and exhibits of evidence, and the following evidence was rejected, and objections and motions were made, and rulings of the court were entered, and exceptions taken by the parties, all as follows, to wit: [74]

[Title of District Court and Cause.]

TRANSCRIPT OF TESTIMONY AND PROCEEDINGS

Attorneys for Plaintiffs:

Medley & Haughland, 1011 American Building,
Seattle 4, Washington.

Bogle, Bogle & Gates, 603 Central Building, Se-
attle 4, Washington.

W. C. Arnold, 682 Dexter Horton Building, Se-
attle 4, Washington.

Attorneys for Defendant:

Harry O. Arend, United States Attorney, Fair-
banks, Alaska.

William E. Berrett, Assistant U. S. Attorney,
Fairbanks, Alaska.

Marvin J. Sonosky, Attorney, Department of Jus-
tice, Washington, D. C.

The above cause came on regularly for trial at
ten o'clock A. M., Tuesday, October 29, 1946, before
the Honorable Harry E. Pratt, Judge of the above-
entitled court, [75] at Fairbanks, Alaska, and the
following is the transcript of the testimony given
and the proceedings had therein.

The attorneys present were:

Edward F. Medley and W. C. Arnold for the
plaintiffs;

Harry O. Arend and William E. Berrett for the
defendant. [76]

The Court: This is the time set for trial in the case of Grimes Packing Company, et al. versus Hynes, and so forth. Are the parties ready?

Mr. Arnold: Plaintiffs are ready, your Honor.

Mr. Berrett: Defendant is ready, your Honor.

The Court: Very well, proceed with the case.

Mr. Arnold: If the Court please, counsel entered into a stipulation relative to certain of the pleadings; that stipulation has been filed. Counsel also entered into a stipulation relative to the taking of testimony by deposition, and testimony was taken by deposition. Commission was issued by this court; I understand that the commission was returned with the depositions. I am not specifically familiar with the procedure, but, if it is necessary to ask to have the deposition published, we now request it be published.

The Court: Under our rule of court, it isn't necessary to publish a deposition. It is published when it is filed.

Mr. Arnold: That is satisfactory, of course. I will say, briefly, for the convenience of the court that the principal part of our testimony, affirmative testimony, if not all of it, is contained within the depositions, and we are ready to proceed in any manner in which the court may indicate relative to these depositions. Would your Honor desire them read in court or considered read?

The Court: I would like to have you read them.

(Opening statements were made by counsel for plaintiffs and for defendant.)

(Whereupon the following commission to take depositions, depositions, and certificate of the taker thereof were duly read in evidence and the following objections made to portions thereof and ruling of the court, to wit:)

“In the District Court for the Territory of Alaska
Fourth Judicial Division,

“No. 5505 Civil

“GRIMES PACKING CO., KODIAK FISHERIES COMPANY, LIBBY, McNEILL & LIBBY, FRANK McCONAUGHY & CO., INC., PARKS CANNING CO., INC., SAN JUAN FISHING & PACKING CO., and UGNIK FISHERIES, INC.,

Plaintiffs,

vs.

FRANK HYNES, Regional Director, Fish and Wildlife Service, Department of the Interior,

Defendant.

“COMMISSION TO TAKE DEPOSITION

“The President of the United States of America:

“To: E. E. Lescher, Notary Public in and for the State of Washington, residing at Seattle therein:

“Whereas, the above named plaintiffs and defendants have, by their respective counsel, stipulated and agreed that the depositions of Guy V. Graham, O. L. Grimes, Frank McConaghy, F. A.

Gepner, George King, J. Steele Culbertson and Howard Bailey, may be taken before you at Room 603 Central Building, in the City of Seattle, State of Washington, at 10:00 o'clock [80] A. M. on October 18, 1946, or at such other time or times as may be agreed upon between said attorneys and the Notary Public, said depositions to be taken upon oral examination;

"Now, Therefore, reposing full confidence in your prudence and fidelity, you, E. E. Lescher, are hereby appointed Commissioner to examine said witnesse and hereby authorized and required to cause said witnesses to appear before you at the time and place designated or at such other time or times as may be agreed upon between said attorneys and yourself and diligently examine said witnesses orally under the oath and affirmation of said witnesses by you first in that behalf duly administered; and the said testimony of said witnesses when so taken shall be reduced to writing and signed by said witnesses and certified by you under your official seal; and the said testimony, together with this Commission, you shall then return to the Clerk of the above entitled Court in a sealed envelope at all convenient speed.

"Witness the Honorable Harry E. Pratt, Judge of the above entitled Court, at Fairbanks, Alaska, this 7th day of October, 1946.

"(Seal—District Court, Fourth Judicial Division, Territory of Alaska)

"JOHN B. HALL

"Clerk.

"In the District Court for the Territory of Alaska
Fourth Judicial Division, [81]

"No. 5505 Civil

"GRIMES PACKING CO., KADIAK FISH-
ERIES COMPANY, LIBBY, McNEILL &
LIBBY, FRANK McCONAGHY & CO., INC.,
PARKS CANNING CO., INC., SAN JUAN
FISHING & PACKING CO., and UGNIK
FISHERIES, INC.,

Plaintiffs;

vs.

FRANK HYNES, Regional Director, Fish and
Wildlife Service, Department of the Interior,

Defendant.

"Depositions of: Howard Bailey, Frank Mc-
Conaghy, F. A. Gepner, George W. King, Guy V.
Graham, O. L. Grimes, Gordon Jenkins, and J.
Steele Culbertson.

"Be It Remembered That on Friday, the 18th
day of October,, 1946, at the hour of ten o'clock
A. M., in Room 200 Colman Building, Seattle,
Washington, there appeared Howard Bailey, Frank
McConaghy, F. A. Gepner, George W. King, Guy
V. Graham, O. L. Grimes, Gordon Jenkins and J.
Steele Culbertson, witnesses on behalf of the plain-
tiffs in the above entitled action, before E. E. Les-
cher, a notary public in and for the State of Wash-
ington, residing at Seattle; that there were also

present W. C. Arnold, Stanley B. Long, Frank L. Mechem and Edward F. Medley, attorneys for the plaintiffs, and Harry O. Arend, attorney for the defendant.

“Whereupon the following proceedings were had:

“Mr. Arnold: Let the record show that these depositions are being taken pursuant to commission issued to E. E. Lescher, [82] a notary public in and for the State of Washington, residing at Seattle, at the hour of ten o'clock a. m., on this Friday, the 18th day of October, 1946, at 200 Colman Building, Seattle, Washington.

“Let the record further show that it is stipulated that all objections save and except as to the form of the question are reserved until the time of trial;

“That it is further stipulated that the signatures of the witnesses to their respective depositions are waived;

“That it is further stipulated that these depositions may be taken at 200 Colman Building, Seattle, Washington, instead of the place set forth in the commission to take depositions, to wit, 603 Central Building, Seattle, Washington;

“That it is further stipulated that Gordon Jenkins may be called as a witness on behalf of the plaintiffs to testify on behalf of the plaintiffs in the above entitled action, notwithstanding the fact that his name is not set forth in the commission to take depositions as witnesses called on behalf of the plaintiffs;

“That it is further stipulated that a sealed copy of the depositions shall be delivered to one of the

attorneys of record for the purpose of delivery to the Clerk of the Court of the Fourth Judicial Division, Territory of Alaska, for use in case the original is lost.

DEPOSITION OF HOWARD BAILEY

“Howard Bailey, called as a witness on behalf of the Plaintiffs, having been first duly sworn by the Commissioner, was examined and testified as follows:

Direct Examination

“By Mr. Arnold:

“Q. Will you state your name and address?

“A. F. H. Bailey, 5710 Orcas Street, Seattle, Washington.

“Q. State your occupation.

“A. I am General Superintendent for the Kadiak Fisheries Company.

“Q. How long have you occupied the position of General Superintendent of the Kadiak Fisheries Company?

“A. 14 years.

“Q. State whether or not the Kadiak Fisheries Company is one of the plaintiffs in this controversy.

“A. The Kadiak Fisheries Company is one of the plaintiffs in this controversy, yes.

“Q. If you know, state how long the Kadiak Fisheries Company has been engaged in the salmon canning business in the Territory of Alaska.

“A. 34 years.

“Q. How long has the company been engaged

in the salmon canning business on Kodiak Island?

"A. 34 years.

"Q. State what canneries your company owns and operates on Kodiak Island. [84]

"A. From the time that they started?

"Q. Yes.

"A. The cannery at the town of Kodiak.

"Q. When was that?

"A. Until 1938. Well, in 1925 they built another cannery at Shearwater Bay on Kodiak Island, and in 1938 they moved from Kodiak to their present location at Port Bailey.

"Q. Where does the company presently own salmon canneries on Kodiak Island?

"A. They operate a cannery at Port Bailey, and one at Shearwater—Shearwater Bay.

"Q. Are you familiar with the plants and properties of the Kodiak Fisheries Company on Kodiak Island?

"A. Yes.

"Q. Will you state what the investment consists of? How much money is invested—how much money the Kodiak Fisheries Company has invested in its Port Bailey cannery on Kodiak Island?

"A. Is that with reference to the cannery alone?

"Q. The cannery and the shore facilities.

"A. \$220,000 depreciated value in the Port Bailey cannery, and \$111,000 depreciated value in the Shearwater cannery.

"Q. What investment does the company have in floating equipment at these two plants?

"A. They have \$140,000 depreciated value in

floating equipment at Port Bailey, and \$80,000 depreciated value in floating [85] equipment at Shearwater Bay.

"Q. Did both of these plants operate during the fishing season of 1946?

"A. Yes.

"Q. Did they both operate during the fishing seasons of 1941, 1942, 1943, 1944, and 1945?

"A. Yes, they did.

"Q. State, if you know, the amount of money which the Kadiak Fisheries Company expended in pre-season preparations for the operation of these two plants for the season of 1946.

"A. The pre-season expenditure at Port Bailey would be \$455,000—approximately \$455,000, and at Shearwater Bay it would be approximately \$200,000.

"Q. Can you roughly itemize those items and describe generally what those pre-season expenditures cover?

"A. Well, pre-season, I take it, means up to the time that we can any fish.

"Q. That is correct.

"A. Well, cannery fuel, diesel oil, gasoline, and petroleum products amounted to approximately \$18,000.

"Q. Is that for both canneries?

"A. That is for Port Bailey.

"Q. Then will you proceed to detail as best you can the pre-season expenditures at Port Bailey?

"A. Cannery fuel, diesel oil, gasoline, petroleum products [86] amounted to \$18,000; cans, \$130,000;

cartons, \$14,000; piling, around \$37,000; trap supplies, fishing gear and other cannery supplies, \$159,000; freight, \$20,000; wages, approximately \$56,000; and transportation of crews, approximately \$17,000.

“Q. Will you give the same information for the Shearwater plant?

“A. The Shearwater plant, cannery, fuel, diesel oil, gasoline, petroleum products were approximately \$14,000; cans, \$53,000; cartons, \$6,000; fishing gear and other cannery supplies, \$100,000; freight, \$6,000—approximately \$7,000; wages, approximately \$13,000; and transportation of crews, \$6,000.

“Q. State, if you know, the number of employees, not including fishermen, which your company transported to these plants on Kodiak Island in 1946 in preparation for the season.

“A. To our Port Bailey cannery we transported 162 employees; to the Shearwater cannery it was 85.

“Q. Those figures are exclusive of fishermen?

“A. Those figures are exclusive of fishermen.

“Q. State—

“A. (Interposing) Now, just wait. We transported four fishermen from below. •

“Q. But the figures that you gave—

“A. (Interposing) Are exclusive.

“Q. Are exclusive of fishermen?

“A. Yes, sir.

“Q. State, if you know, the number of fishermen which you transported. [87]

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"A. Transported four fishermen from below.

"Q. When you say, "From below," you mean from where?

"A. From Seattle.

"Q. From Seattle?

"A. Yes, sir.

"Q. To which cannery?

"A. The Port Bailey cannery.

"Q. Did you transport any to Shearwater?

"A. None.

"Q. State, if you know, the total number of fishermen employed or utilized at the two plants during the 1946 season.

"A. Port Bailey had 90 local fishermen, which would make it 94 fishermen employed; and Shearwater 26 local fishermen.

"Q. Do all of these fishermen fish on boats owned by the company?

"A. Some of them—no, they do not all fish on boats owned by the company.

"Q. Can you state how many fish on boats owned by the company—if you do not have that here—

"A. (Interposing) I can give it to you approximately from memory, but the thing is that I do not know how many men were on each boat. You want the number of men, don't you?

"Mr. Arnold: I will withdraw the question.

"Q. (By Mr. Arnold) State, if you know, the number of boats owned by the company which were engaged in the 1946 fishing operations—approximately, if you do not have a definite figure. [88]

"A. Six.

"Q. And about how many fishermen would be employed on those six boats?

"A. They are three-man boats. Some of them have four and some three.

"Q. State, if you know, the number of boats independently owned from which the company received fish during the 1946 season—approximately.

"A. I cannot quite state that, Judge. We bought quite a lot of independent fish. We have fishing for us at Port Bailey Cannery two boats that are wholly independent.

"Q. That is, as I understand it, in addition to the six company boats and the two independent boats you receive some fish from other sources?

"A. That is right. And we have eight boats on purchase contracts.

"Q. Will you explain that, what you mean by a purchase contract?

"A. A purchase contract is this: we help fishermen buy their boats. For instance, we build a boat and let them fish it, and pay them the independent price for the fish, and take the difference between the independent and the company cured price as a payment on the boat. They are our fishermen and they fish for us and pay for their boats in that way.

"Q. Are you familiar with the prices paid for fish to company and independent fishermen on Kodiak Island during the past several years? [89]

"A. Yes, I know what they are if I see them.

"Mr. Arnold: I will have this marked as Plaintiffs' Exhibit 1 for identification.

“(Thereupon, the document above referred to was marked Plaintiff’s Exhibit 1 for identification.)

“Q. (By Mr. Arnold) Mr. Bailey, I hand you a document marked Plaintiff’s Exhibit 1 for identification. Will you state what the exhibit is?

“A. The exhibit shows the price paid for different species of fish from 1940 to 1946—in other words, the fish price agreement.

“Q. Where?

“A. On Kodiak Island.

“Q. State whether or not a differential price for company and independent fish is indicated on the exhibit.

“A. The difference between company gear price and the independent price is exhibited on this exhibit.

“Mr. Arnold: We offer the exhibit in evidence.

“Mr. Arend: We will object to it as to every year except 1946. I have no objection to it being offered for 1946.”

Mr. Berrett: If the Court please, the defendants will withdraw that objection.

The Court: Very well.

Mr. Berrett: If the Court please, I am agreeable, and I understand counsel for plaintiffs is, to have this exhibit considered as read. [90]

Mr. Arnold: That is agreeable, your Honor.

The Court: Very well, then, it may be considered as read.

Mr. Arnold: Then, if the Court please, we

would ask to have the plaintiffs' Exhibit 1 in the deposition marked as Plaintiffs Exhibit A in this matter.

The Court: It may be so marked.

(Thereupon Plaintiffs' Exhibit 1 for identification in the deposition was marked as Plaintiffs' Exhibit A.)

"Q. (By Mr. Arnold) Mr. Bailey, will you explain the relationship between your company on Kodiak Island and its fishermen—both company and independent—and explain the reason for the differential in price between the two groups?

"A. Well, a company gear fisherman is furnished everything. He is furnished a boat; fishing gear; his fuel, and he is paid a certain price. An independent fisherman has his own boat and his own gear. In other words, the investment is his, and he is paid a different price.

"Q. Is there a uniform differential in price?

"A. There is a uniform differential in price.

"Q. Is that differential indicated on Exhibit 1?

"A. The differential is indicated on Exhibit 1.

"Q. How are the dates between which commercial fishing can be conducted on Kodiak Island determined?

"A. By the fishing regulations of the Fish and Wildlife Service.

"Q. What were the approximate dates between which fishing was permitted [91] on Kodiak Island during 1946?

"A. The approximate dates, as far as the regu-

lation was concerned, the fishing opened on the 1st of June and closed approximately on the 13th of August, I believe, or the 14th or the 15th—but I think it dropped down to the 13th. And there were some closed periods during the 1946 season when the warden closed the area. However, the Karluk area closure is governed by the weir count.

“Q. Will you explain the situation at Karluk with reference to the weir count?”

“A. If the count—they count the fish at the weirs as they go up, and they keep in touch with the canneries and get their catch, and if the weir count falls below the commercial catch, they have the right to close it until the weir count catches up a little bit. They figure that they will come out about even. Or, in other words, they want so many fish up the weir, and if they think that they are going to get them, all right, they will open it up and let us fish again.

“Q. Who do you mean by ‘they’?”

“A. I mean the warden—the Fish and Wildlife Service.

“Q. State who operates the weir, and who conducts the weir count and the count of the commercial catch.

“A. The Fish and Wildlife Service conduct them.

“Q. Will you explain, briefly, what the Karluk weir is, and how it is operated? [92]

“A. Well, it is a weir that is built—it is built right across the river so as to stop the fish. They have doors in it that they open up, or tunnels, and

they open them up and let the fish go through, and they attempt to count them with a counter as they go through this narrow space.

"Q. Is commercial fishing prohibited in the Karluk River?

"A. Right in the river, yes.

"Q. Where is the weir located—approximately?

"A. Well, the weir, when I saw it, was just above the lagoon. There is a lagoon inside of the mouth of the river, and I suppose that lagoon is a quarter of a mile long, and the weir was at the head of that when I saw it. Where it is now, I don't know. It may be at the head of the lake now, but I don't know.

"Q. Is commercial fishing permitted in the lagoon?

"A. No, it is not.

"Q. Are you familiar with the order promulgated by the Secretary of the Interior establishing the Karluk Indian Reservation?

"A. I have heard of it, yes.

"Q. Will you state whether in the years prior to 1946 the operations of your company on Kodiak Island were interfered with in any manner by the Karluk natives, or by the Office of Indian Affairs?"

Mr. Berrett: If the Court please, we object to that question as being incompetent, irrelevant, and immaterial, for this reason: This is a case directed against Mr. Frank Hynes, [93] Regional Director of the Fish and Wildlife Service in Alaska. Mr. Hynes has no connection with the Department of

Indian Affairs-or with the natives of the village of Karluk. The first regulation under which Mr. Hynes has any duty or responsibility in regard to the fishing in the waters of Karluk, other than the regular regulations of closed periods, is the regulation published March 22, 1946, so that any interference prior to that date by the Indian Service, or by the natives of the village of Karluk, under ordinance of their village council, has nothing to do with the defendant in this action. They would not be threats instigated by him or to which he is a party. They might be matters over which he had no control and obviously no duty, so that to this question and to others of similar import we object; so far as this action against defendant Hynes is concerned, they are incompetent, irrelevant and immaterial.

Mr. Arnold: If the Court please, counsel's statement is approximately correct, and I find no quarrel with it. I also think that the objection raises the question which will be recurring throughout the reading of these depositions. The question put to the witness has to do with interference; or threats of interference, made at Karluk in years prior to 1946, and it is true, as counsel stated, that the regulation of the Fish and Wildlife Service prohibiting fishing at Karluk except by inhabitants of the reservation or persons authorized by them [94] was not promulgated until the spring of 1946 and that for the first time the defendant Hynes then had a duty to perform in the enforcement of that regulation. But we contend that the evidence as to what occurred in the years prior to 1946 is relevant to

this controversy and properly offered and should be received, and for these reasons this suit seeks not only to test the validity of this regulation and to enjoin its enforcement, but it also attacks public land order No. 128, the order of the Secretary of the Interior creating this reservation. This order was issued in 1943 and some efforts were made to enforce it in 1944 and 1945, and we contend that for that reason it is relevant, but not for that reason alone. All of these things which were done at Karluk in efforts to interfere with our operations were done under the supervision of or by an agency of the Department of the Interior, which had issued Public Land Order No. 128. The Secretary of the Interior had issued it. The Secretary of the Interior also promulgated the fishery regulation in 1946 which the defendant Hynes attempted to enforce. We feel that we are entitled to show the cumulative effect of these threats and all of these interferences over the years, after Public Land Order No. 128 was issued in 1943. That in itself constituted a threat and a potential interference with our operations, and we contend that we are entitled to show what was done and what efforts were made to preclude us from fishing [95] as we had always fished before, in those years, and that anything, any evidence, which shows what was done or attempted to be done to enforce either Public Land Order No. 128 or the fishery regulation is pertinent to this controversy. Judge Medley calls my attention to the fact that the regulation itself, the regulation issued in 1946, which Hynes is attempting to enforce, ap-

pears on its face to be a public land order. That is section No. 208.23 of the regulations for the protection of the commercial fisheries of Alaska for 1946, and it reads as follows:

"Sec. 208.23. Waters closed to salmon fishing. All commercial fishing for salmon is prohibited as follows:

"Subdivision (r). All waters within 3,000 feet of the shores of Karluk Reservation (Public Land Order No. 128, May 22, 1943), beginning at a point on the east shore of Shelikof Strait" and so on.

We maintain that both are inseparable and both are under attack in this case. All these things were done in an effort to enforce either Public Land Order No. 128 or the reservation of 1946. We want to show what did occur. We think the objection is not well taken.

Mr. Berrett: If I may add further, if what the counsel for the plaintiff said were true—that they are attacking the act of the Secretary of the Interior, dated May of 1943; that they are attacking the actions of the natives of Karluk [96] on a reservation and an ordinance promulgated by their council—then the Secretary of the Interior should have been made a party defendant in this action, and the United States of America, as guardian of the Indians, who are their wards, should have been made a defendant in this action. Having not made them defendants, I don't see how the counsel for the plaintiff can contend that the action of the Secretary of the Interior in promulgating an order

in May of 1943 can be used as a threat by the defendant Hynes, or an ordinance by the Indian village prior to this year has been so used. It would be as much as to say that, if one individual were bringing an action in assault and battery against another individual, he could not introduce evidence that a third individual had struck him. The regulation which was partially quoted by counsel, which is section 208.23, and subdivision (r) in parenthesis, does make a reference to Public Land Order No. 128, May 22, 1943, but it is included in this regulation in parenthesis, following the description of the area in which fishing is reserved and evidently is included only to corroborate the description and to make it clear that the order includes the water which had been set forth in the reservation. It has no other connection with the prior order of the Secretary of the Interior. It is merely an illusion to it in parenthesis to make the place clear. I again urge the same objection, your Honor, to this question. [97]

The Court: I will overrule the objection. You may make your argument, if you wish, on the final argument as to whether or not it proves any of the issues of this particular case.

Mr. Berrett: May the record show an exception to these rulings on this type of question?

The Court: It always does. Any objection carries with it the implied reservation of an exception.

A: They were interfered with to a certain extent in 1944, 1945, and 1946 by the Office of Indian Affairs.

"Q. Will you detail what occurred, commencing with the year 1944?"

Mr. Berrett: Your Honor, I raise the same objection to the question.

The Court: Same ruling.

"A. Well, they set out these markers. The markers were set out by the Bureau of Indian Affairs, and we were instructed to keep outside of the markers, which slowed our fishing up quite a little.

"Q. Where were those markers located—approximately?"

Mr. Berrett: I raise the same objection, your Honor.

The Court: Same ruling.

"A. Well, they were along the Karluk Spit and from the mouth of the river—oh, I think they were—I think the markers—I cannot be too sure of that. The markers were—

"Mr. Arnold (Interposing): I will have this marked as [98] Plaintiffs' Exhibit 2 for identification.

"(Thereupon the document above referred to was marked Plaintiffs' Exhibit 2 for identification.)

"Q. (By Mr. Arnold): Mr. Bailey, I hand you a document marked Plaintiffs' Exhibit 2 for identification, and I will ask you if you know what that exhibit is? A. Yes, I know what it is.

"Q. What is it?

"A. It set out the markers.

"Q. Well, what is the exhibit—what does it consist of—the whole document?

"A. Well, the whole document is a chart Cape Ikolik to Cape Kuliuk.

"Q. Where are those points?

"A. They are on Kodiak Island.

"Q. State whether they cover the area of the Karluk River and the Karluk Indian Reservation.

"A. They cover the area of the Karluk River and the Karluk Indian Reservation.

"Mr. Arnold: We offer the exhibit in evidence.

"Mr. Arend: Well, I have no objection at the present time. I am not versed on the map itself, but I will reserve any objection to the time that it is presented in evidence in court.

"(The document heretofore marked Plaintiffs' Exhibit 2 for identification received in evidence.)

"Q. (By Mr. Arnold): Will you indicate on Exhibit 2 the location [99] of the Karluk River?"

Mr. Arend: If the Court please, at this time the questions do not indicate—the questions and answers—as to when these markers were established and placed upon this map, so it will require further testimony from the deposition before we can make valid objection to that effect. We reserve the right to move to have the exhibit stricken from the record.

The Court: Are you offering it in evidence at this time?

Mr. Arnold: I want to offer it in evidence. How-

ever, I am willing to wait until the close of the depositions.

The Court: Has it been identified as fully as this witness can identify it?

Mr. Arnold: It is further identified by other witnesses in the depositions. I would suggest we don't offer it until the close of the testimony.

The Court: All right.

A. You mean just point it out?

Q. Yes.

A. The Karluk River is right in here (indicating on Plaintiff's Exhibit 2).

Q. Can you determine from the exhibit approximately where the markers were established by the Karluk natives and the Office of Indian Affairs in the season of 1944?

A. These must be the markers, Judge, one, two, three (indicating). Here they are (indicating). [100]

Mr. Arend: It might be well to let the record show that there are circles with a line drawn through the center where he is pointing.

Mr. Arnold: Let the record show that.

Q. (By Mr. Arnold): I understand you to say that your fishermen were instructed to remain outside of those areas in 1944.

Mr. Barrett: We object, your Honor, to this question on the same grounds as previously stated.

The Court: Same ruling.

A. We were informed that they were.

Q. Who issued those instructions?

Mr. Berrett: Same objection, your Honor.

The Court: Same ruling.

Mr. Berrett: I wish to object to the question on line one.

"A. The Bureau of Indian Affairs.

"Q. The Bureau of Indian Affairs?

"A. Yes, sir.

"Q. Will you state what occurred at Karluk in 1945 with reference to the reservation?"

Mr. Berrett: Your Honor, I enter the same objection to that question.

The Court: Same ruling.

"A. Well, prior to the opening of the fishing season in 1945, Louis Muller of the Bureau of Indian Affairs visited our Port Bailey Cannery and advised us that they would put the markers [101] up again, and that we were to observe them. So we were warned not to fish inside of the markers in 1945 by the Bureau of Indian Affairs.

"Q. State what occurred after that?"

Mr. Berrett: I enter the same objection, your Honor, to that question.

The Court: Same ruling.

"A. When our boats left for the fishing grounds, the fishermen were instructed to ignore the markers, but to stay out of the way of the native beach seines, and under no circumstances were they to apply for any permit to fish in the area. Karluk residents and the minor officials of the United Fishermen of Alaska endeavored to have the men take

out permits, but to our knowledge no one did.

"Q. Now, will you state what happened in 1946 with reference to the Karluk Indian Reservation?

"A. Prior to the opening of the fishing season in 1946, the local union working with the Karluk Village encouraged all fishermen intending to fish at Karluk to obtain permits before the season opened. As a result a large portion of them did obtain permits, although several had some difficulty in obtaining permits, as they were on the list of those who had fished inside of the markers the two previous years. Our outside foreman was advised by Mr. Bingham, the Karluk teacher, that permits would be issued to all that applied unless the village council decided [102] to limit the number to be granted; in that case it would be the first to apply that would receive the permits.

"The area inside the reservation buoys was patrolled by a boat operated by employees of the Bureau of Indian Affairs, and all boats were kept outside.

"The run of fish was light, and the fish were all schooled inside the reservation markers, so little was caught outside. The fishermen were disgusted and moved to other areas. The entire island was closed by Fish and Wildlife order from July 8 to 14, inclusive. At the opening, fish were showing fairly well in Karluk and the boats returned there. The reservation was still being patrolled and the boats stayed outside, and little was caught in the outside areas, but some good hauls were made inside by

the beach seines. The entire area closed again on the 18th and reopened on the 22nd.

"Previous to the opening of fishing on the morning of July 22nd, we had received information that an injunction had been issued at Fairbanks restraining the Department of the Interior from enforcing the reservation.

"On that morning our outside foreman contacted the enforcement officer for the Bureau of Indian Affairs at Karluk and was advised that he had received no word of the injunction, so the boats would have to remain outside of the buoyed area.

"A copy of the wire sent to our Seattle office is attached. [103]

"The following day we received word from our Seattle office concerning the information of the injunction, and we advised our fishermen to that effect. From that date until the end of the season our boats fished freely inside the markers.

"During that time several of our fishermen reported that they had been told by the Karluk natives that their names were taken down and set for future action in the event the reservation was restored.

"Q. Mr. Bailey, reverting to the year 1944, will you state whether or not your company received any communication from the Department of the Interior or the Office of Indian Affairs relative to your fishing within the boundaries of the reservation?"

Mr. Berrett: If the Court please, I want to enter the same objection to that question.

The Court: Same ruling.

"A. Yes, we received a letter from the Office of Indian Affairs, from the Solicitor.

"Mr. Arend: From the Solicitor?

"The Witness: Yes.

"Mr. Arnold: I would like to have this document marked as Plaintiffs' Exhibit 3 for identification.

"(Thereupon the document above referred to was marked Plaintiffs' Exhibit 3 for identification.)

"Q. (By Mr. Arnold): Mr. Bailey, I hand you Plaintiffs' Exhibit 3 for identification, and I will ask you to state what the [104] exhibit is.

"A. This is a letter from the United States Department of the Interior, Office of the Solicitor, Counsel at Large, Juneau, Alaska, to the Kadiak Fisheries, 412 Lowman Building, Seattle, Washington.

"Q. What date does the letter bear?

"A. It is dated July 4, 1944."

Mr. Berrett: Your Honor, may I interpose an objection here? Of course, we will object to the introduction of the exhibit when it is presented, but those questions concerning the exhibit we object to because we object to the exhibit, so to the question on line 10 (line 24, page 26, this transcript), the question on line 17 (line 6, page 27, this transcript), and the question on line 19 (line

18, page 27, this transcript) may it be entered that we object?

The Court: Overruled.

"A. It is dated July 4, 1944.

"Q. And over whose signature is it?

"A. George W. Folta.

"Mr. Arnold: I offer the exhibit in evidence.

"Mr. Arend: We object to it as irrelevant and not in issue in the present case."

Mr. Arnold: At this time, if the Court please, I would like to offer the document marked Plaintiffs' Exhibit 3 in the deposition of Mr. Bailey in evidence as Plaintiffs' Exhibit B in this case. [105]

Mr. Berrett: Your Honor, we object to the admission of this document in evidence, purporting to be a letter from George W. Folta, counsel at large for the Department of the Interior, on July 4, 1944. It bears no relationship to the defendant Hynes and no relationship to any provisions in the fisheries' regulations. We object to it as being incompetent, irrelevant, and immaterial in this action.

The Court: Objection overruled. It may be admitted.

(Plaintiffs' Exhibit 3 for identification in the deposition of Mr. Bailey was marked "Plaintiffs' Exhibit B" in this cause.)

Mr. Arnold: Is it agreeable to counsel to consider the exhibit considered as read?

Mr. Berrett: Yes.

The Court: It may be so considered.

(The letter as set forth in the deposition of Mr. Bailey was read into the record.)

“Mr. Arend: I would like to ask at this time for what purpose you have offered this exhibit.

“Mr. Arnold: The purpose is to establish the fact that in 1946 and in years prior thereto the Department of the Interior had sought to interfere with the operations of this company that it normally conducted on Kodiak Island, including the area contained in the alleged Karluk Reservation.

“Mr. Arend: Do you maintain that it constitutes a [106] threat—this particular letter?

“Mr. Arnold: Our position is that all of the actions of the Department of the Interior and the Office of Indian Affairs and Fish and Wildlife Service, and the natives of Karluk, and the Counsel at Large, taken together, constitute a continuing threat to interfere with our operations.

“Mr. Arend: Well, we renew the objection that we have heretofore made, with the further objection that it does not constitute a threat.

“Q. (By Mr. Arnold): Reverting now to the season of 1946, Mr. Bailey, state whether or not you were advised during the spring of 1946 that Frank Hynes, the Regional Director of the Fish and Wildlife Service, and the defendant in this action, had issued instructions to his agents to enforce the regulation prohibiting fishing within the Karluk Reserve, except by the inhabitants of the Reserve, or persons authorized by such inhabitants.

"A. We were informed that Frank Hynes had instructed the warden at Kodiak—the Fish and Wildlife Service warden at Kodiak; to enforce the regulation; that it was written into the Fish and Wildlife regulations; and that he was to enforce them.

"Q. State when and where that information came to you.

"A. I saw a copy of the wire at the Industry Office in Seattle.

"Q. On what date, if you know?

"A. May 28, 1946.

"Mr. Arnold: I ask to have this document marked as [107] Plaintiffs' Exhibit 4 for identification.

"(Thereupon the document above referred to was marked Plaintiffs' Exhibit 4 for identification.)

"Q. (By Mr. Arnold): Mr. Bailey, I hand you Plaintiffs' Exhibit 4 for identification, and I will ask you whether or not that is the wire which you referred to in answering the previous question.

"A. This is the wire that I saw—yes.

"Q. On the 28th of May, 1946?

"A. On the 28th of May, 1946, yes.

"Mr. Arnold: We offer it in evidence.

"Mr. Arend: Is this the original?

"Mr. Arnold: Yes. I should like to state for the record that we will show by other witnesses that Mr. Culbertson who sent that wire is an official of the Alaska Salmon Industry, Incorporated, a trade organization, of which the Kodiak Fish-

eries and other plaintiffs in this suit are members.

“Mr. Arend: Of course, since we have reserved our stipulation objections as to relevancy and competency, I therefore reserve my objection to this document until the time of trial—that is, as to its receipt in evidence.

“Q. (By Mr. Arnold): Will you read the wire, Mr. Bailey——”

Mr. Arnold (Interposing): Just a minute. At this time, if the Court please, we offer Plaintiffs' Exhibit 4 in this deposition in evidence as Exhibit C. [108].

Mr. Berrett: No objection, your Honor.

The Court: It may be admitted.

(Thereupon the document marked Plaintiffs' Exhibit 4 in the deposition of Mr. Bailey was marked Plaintiffs' Exhibit C in this cause.)

Mr. Arnold: We offer to stipulate that the exhibit shall be considered as read and not read from the testimony of the deposition.

Mr. Berrett: We so stipulate.

“Q. (By Mr. Arnold): What is the date of the wire?

“A. That is May 26, 1946—no. It was filed then. It was received May the 27th. Filed May 26, 1946, and received May the 27th.

“Q. Mr. Bailey, have you examined the records of your company——

“A. (Interposing): I have.

“Q. (Continuing): ——to determine the pack

and catch of fish of your company from the year 1941 to 1946 and the portion of that catch and pack which came from the area now embraced within the Karluk Reservation?

"A. Yes, I have.

"Mr. Arnold: I ask to have this document marked as Plaintiffs' Exhibit 5 for identification.

"Thereupon the document above referred to was marked Plaintiffs' Exhibit 5 for identification.)

"Q. (By Mr. Arnold): Mr. Bailey, I hand you Plaintiffs' Exhibit 5 [109] for identification and ask you to state what it is.

"A. Well, this is a report of our packs from 1941 to 1946 on Kodiak Island; the number of fish caught and the number of fish packed in each of those years.

"Q. State whether or not it shows a segregation between fish caught generally and packed generally and those caught and packed from the Karluk Reserve.

"A. Yes. It shows that differently.

"Q. Was that exhibit prepared under your direction?

"A. Yes, it was.

"Q. Where was the information obtained from?

"A. From our books—from the books of the company.

"Q. State whether or not that exhibit accurately reflects the catch and pack statistics of your company as shown by your records.

"A. Yes, it does.

"Mr. Arnold: I offer it in evidence as Plaintiffs' Exhibit 5."

Mr. Arnold: If the Court please, we offer Plaintiffs' Exhibit 5 from this deposition as Plaintiffs' Exhibit D in this case.

Mr. Berrett: We have no objection.

The Court: It may be admitted.

(Thereupon Plaintiffs' Exhibit 5 for identification from the deposition of Mr. Bailey was marked Plaintiffs' Exhibit D in this cause.)

Mr. Arnold: I offer to stipulate that Plaintiffs' Exhibit D be considered as read.

Mr. Berrett: We so stipulate.

The Court: Very well.

"Mr. Arend: It does not refer merely to the Karluk area, does it?"

"Mr. Arnold: To both.

"The Witness: To both.

"Mr. Arend: To the Karluk area and to what other area?"

"Mr. Arnold: To Karluk, and other than Karluk. Is that right?"

"The Witness: Yes.

"Mr. Arend: Oh, I see what you mean. You made no segregation here, did you (indicating)?"

"The Witness: Yes, we have.

"Mr. Arnold: Yes.

"Mr. Arend: Have you?"

"The Witness: Yes. This is the Karluk area (indicating), and this is the overall picture (indicating)—the number of fish and the number of

cases. The Karluk area, for instance, are in the last two compilations. 'The total catch of fish taken within the area now included in the Karluk Indian Reservation.' These two are Karluk (indicating). One is fish and the other is cases—one-pound talls.

"Mr. Arend: I have no objections except those already reseryed. [111]

"(The document heretofore marked Plaintiffs' Exhibit 5 for identification was received in evidence.)

"Q. (By Mr. Arnold): Mr. Bailey, referring to Plaintiffs' Exhibit 5, what is the total number of fish taken by your company in the year 1946 from the area within the Karluk Reserve?

"A. The total number of fish taken in 1946 within the area by the Kadiak Fisheries is 1,058,000, approximately.

"Q. Mr. Bailey, assuming that your boats had been prohibited from fishing within the Karluk Reserve, what would have been the effect upon your 1946 operations?

"A. Well, if we had not fished in the Karluk area, our pack would have been—oh, 70 per cent less than what it was.

"Q. Would you have been able to obtain an equal amount of fish from other sources?

"A. No, nowhere within reach—nowheres in Alaska.

"Q. Referring back to Plaintiffs' Exhibit 5, Mr. Bailey, do the figures cover the operations of both of your plants, or just the Port Bailey plant?

"A. These figures here (indicating) cover both of the plants. May I explain that?

"Q. Yes.

"A. For instance, the Shearwater Cannery is a long ways away from Karluk, and while there were some fish sent from Karluk to Shearwater, that did not happen too many times. But while catching fish at Karluk and canning them at Port Bailey, other [112] fish of Port Bailey's that were available to Port Bailey, were sent to Shearwater because they were closer.

"Q. That was for convenience in your operations?

"A. That was for convenience in our operations, yes. This number of fish that was caught in the Karluk area this year, that includes the fish that went to Shearwater in the pack.

"Q. State whether or not in years prior to 1946 the Kadiak Fisheries Company obtained a substantial portion of its fish from areas within the Karluk Reservation.

"A. I think each and every year we get about 35 per cent of our seine pack within the Karluk Reserve.

"Q. If you are deprived of that source of fish, could an equal amount be obtained from other sources?

"A. No, it could not.

"Q. Will you make any explanation that you want to of that?

"A. Well, while we are fishing the Karluk area, we are still fishing in all other areas, and of course

we could not obtain any more in the other areas. We can all that we get in the other areas, and those that we catch in the Karluk area are just that many more.

"Mr. Arnold: That is all of the direct examination.

"Cross-Examination

"By Mr. Arend:

"Q. Mr. Bailey, how far is your Shearwater Bay Cannery from the Karluk Reservation? [113]

"A. Approximately 130 miles.

"Q. About 130 miles?

"A. Yes, sir.

"Q. And the Port Bailey Cannery, how far is that from the Karluk Reservation?

"A. Approximately 50 miles.

"Q. About 50 miles?

"A. Yes.

"Q. Now, how far from your cannery operations do your fishing operations extend—that is, the extreme extent in miles?

"A. 130 miles.

"Q. In other words, the Shearwater is as far away from the Karluk Reservation as any other fishing area that you are engaged in?

"A. I think it is 130 miles, and it is as close around one end of the island as it is the other, which would make it the farthest.

"Q. Do you have any monetary investment at Karluk other than this floating equipment?

"A. No, we do not.

"Q. Now, do the men who fish for your com-

plus, if any, to the Purchaser; but if the proceeds of such sale shall not be sufficient to defray the expenses thereof, and, also the expenses of retaking, keeping and storing the goods, and the balance due upon the purchase price, Kadiak may recover the deficiency from the Purchaser and the Purchaser agrees to pay the same.

“(g) Anything to the contrary hereof notwithstanding, it is expressly agreed that on any default as provided in paragraph (a) hereof, Kadiak shall have the right to rescind this agreement and Kadiak at its option may retake such goods without complying with or being bound by the provisions of paragraphs (c) to (e), inclusive, hereof, as to the boat [131] retaken, upon crediting the Purchaser with the full purchase price of such boat, and so much of this credit as shall be necessary to cancel any indebtedness of the Purchaser to Kadiak shall be so applied, and Kadiak shall repay to the Purchaser on demand any surplus not so required.

“Article X. Complete Agreement: No promise, representation and warranty, express or implied, not herein set forth, shall bind either party hereto.

“Article XI. Applicable Law: This agreement is drawn with the intent of complying with the Uniform Conditional Sales Act of the Territory of Alaska, and any provisions herein that shall violate such Act shall not affect any other provision or provisions hereof complying therewith.

"In Witness Whereof the parties hereto have hereunto set their hands and seals the day and year first above written.

"Kadiak Fisheries Company

"By

Seller

Its

Purchaser

"Mr. Arnold: I may say that the plaintiffs are agreeable to furnishing Mr. Gordon Jenkins, Superintendent of the Port Bailey Cannery, as a witness, his testimony to be taken by a deposition. If it is agreeable to counsel for the defendant, we will stipulate that the stipulation for the taking of these [132] depositions be amended to include the name of Gordon Jenkins.

"Mr. Arend: That is agreeable to the defendant, and it is so stipulated.

"Mr. Arnold: And we will have Mr. Jenkins here this afternoon.

"Q. (By Mr. Arend): Whenever the area was closed in 1946, it was closed to the Karluk Reservation natives as well, was it not?

"A. Yes. The whole island was closed.

"Q. This 70 per cent of your catch coming from Karluk in 1946 is unusual, is it not?

"A. A little, yes. It is more than it has amounted to before.

"Q. 35 per cent is what it ran before that?

"A. Yes. It will average 35 per cent, that is, on the odd years. On the even years it will average 50

pany fish in any areas other than within the restricted area at Karluk? That is, I will restrict that to the company gear fishermen.

"A. Yes; your question is, do they fish in areas—what was the question again?

"Q. The question is, do the company gear fishermen of your company [114] fish in any areas other than within the restricted area of Karluk—that is, during a single fishing season?

"A. Oh, yes.

"Q. They do?

"A. Yes, sir.

"Q. And now, will you please state for the record the names of the boats that were actually fishing—your boats that were actually fishing within the restricted Karluk area during 1946?

"A. The list of boats and their crews is as follows—Kadiak Fisheries Company boats fishing at Karluk—Company boats:

"KFC-18—Nick Berestoff, William Berestoff, Abram Panamaroff.

"Cape Uyak—Dimitri Boskofsky, Alexis Chichinoff, Frank Sheratine.

"KFC-11—August Heitman, Fred Fomin, Fritz Morrison.

"Steep Cape—Willie Knagin, [115] Alexander Chichenoff, Charles Reft.

"KFC-122—George Naumoff, Gregory Channuin, Nick Noya.

"Silver—Pete Koppang, T. Mikelsen, Alf Torgramson.

"Boats being purchased on contract:

"KFC-00—Al King, Arthur Larkin, Victor Malutin.

"KFC-120—Oscar Ellison, Nick Anderson, John Larsen.

"KFC-5—Joe Heitman, Andy Kashiveroff, Kelley Gregorioff.

"KFC-6—Vivan Kilgore, [116] Isaac Hubble, Charles Warren.

"KFC-121—Charles Nelson, Virgil Baker, Stan McLaughlin, Harold Aga.

"KFC-8—John Pestrikoff, Pat Pestrikoff, Abner Nelson.

"Tonki Cape—Paul Petersen, Olaf Melseth, John Hemnes.

"Cape Karluk—William Wynkoop, William Fitzgerald, Precopia Ozhuwan.

"Independent boats.

"Albatross—Virgo Anderson, Fred Anderson, Sam Pratt. [117]

"KFC-19—Hans Olsen, John Larson, Peter Olson.

"KFC-2—Pat Mullin, Dennis Bostofsky.

"Irene—William Anderson, Arcadia Pestrikoff.

"Q. Now, does this list that you have include the names of the boats of the contract fishermen?

"A. Yes, it does.

"Q. Now, when did your company first operate around Kodiak?

"Mr. Medley: May I make a suggestion, instead of calling them 'contract fishermen,' call them 'independent fishermen.' That won't confuse the

court then when he reads the deposition.

"Mr. Arend: That is fine. Where I have used 'contract fishermen,' that will be changed to 'independent fishermen.'

"Q. (By Mr. Arend): When did your company first operate around Kodiak generally?

"A. 34 years ago. That would be 1912. They have been operating on Kodiak Island for 34 years.

"Q. When did your independent fishermen and the company gear fishermen first operate in the Karluk area—the reserve area? [118]

"A. In 1938.

Q. Do you employ any natives at Karluk as company gear fishermen?

"A. Yes. You know, these natives, they live there one or two years, and then they leave, and then they come back. I don't know just what you mean.

"Q. Let us restrict it to 1946. Did you employ any natives at Karluk as company gear fishermen?

"A. In 1946?

"Q. Yes.

"A. No.

"Q. None in 1946?

"A. No.

"Q. Some in previous years?

"A. Well, I don't know just what you mean by 'natives at Karluk.' Do you mean one who was born and raised there?

"Q. One who claims residence there.

"A. We have hired natives to fish for us who

—the seine and other gear used in connection with the vessels? To whom does that belong?

“A. All gear on the company boats belongs to the company.

“Q. How are the crews selected or designated for the company boats?

“A. Well, they are just hired. That is, they are hired to fish on that boat. Arrangements are made for them to fish on that boat with company gear.

“Q. Who has the right to designate the master?

“A. The company.

“Q. Does the company have a similar right to designate or select the fishermen who are to fish on that boat? A. To a certain extent.

“Q. How is that done? [135]

“A. Well, if we hired a master—in other words, a boss fisherman for that boat, and we had some man that was looking to us for an opportunity to fish, we would take it up with the master of the boat first, and if it was all right with him, why we would hire him and put him on there. If the master really objected, why then we would try to find another place for him.

“Q. What happens in the case that the master suggests a certain man that is objectionable to the company? Do you reserve the right to—

“A. (Interposing): We reserve the right not to hire him.

“Q. To keep him off the boat?

“A. To keep him off.

“Q. Dealing again with company boats, what

live there in the wintertime and in the summertime—
—an occasional one.

“Q. But not in 1946?

“A. No.

“Q. Now, do you buy fish from the native residents of Karluk?

“A. We bought fish from them this year, yes.

“Q. They were independent fishermen, were they?

“A. They were. We bought fish from the Karluk seine this year—the big seine—from those who were fishing on the reservation. [119],

“Q. Are any of the Karluk native residents engaged in boat fishing?

“A. Well, yes.

“Q. Isn't that restricted to the younger men?

“A. It possibly is. The old Karluk natives stay right there, but some of the younger men fish on these boats for other companies than ours.

“Q. What other companies other than your plaintiff companies in this action are fishing in the Karluk area?

“A. There is Port Williams; the Pacific-American Fisheries; the Oreas Canning Company, and the Alaska Packers.

“Q. Mr. Bailey, paragraph four of the complaint speaks of cannery employees transported. Will you explain what you mean by a cannery employee?

“A. Well, your machinists, or anybody who works within the cannery, preparing the fish or canning the fish.

control do you exercise over the place where the boats fish?

"A. We control it to a certain extent.

"Q. Now, dealing with contract boats and independent boats, if a contract boat or an independent boat were seized for fishing within the Karluk Reservation, would that affect your operations?

"A. Yes, it would.

"Q. In what way?

"A. Well, it would be just—each boat produces so many fish and the boats that were seized would not be able to produce.

"Q. It would result in a loss of production?

"A. It would result in a loss of production, that is right. [136]

"Q. How would that affect your cost of—the production cost of your operation?

"A. Well, it would be a loss.

"Q. Mr. Bailey, did I understand you to say that Kadiak Fisheries' boats and fishermen did not fish at Karluk until 1938? A. Yes.

"Mr. Arnold: That is all.

• "Recross Examination

"By Mr. Arend:

"Q. What compensation did you receive for the use of the gear on the fishing boats?

"A. There is no compensation except the difference between independent price and company gear price. There is a differential in the amount of money paid for the fish.

"Q. Do you regard any of your fishermen as cannery employees?

"A. No, I don't. Those are not what we call a cannery employee. You see, our men that are on our boats—it is distinguishing between the men that work in the cannery and the men that work on the fishing gear.

"Q. Well, do you regard any of the men that work on your fishing gear as company employees?

"A. They are company employees, yes.

"Q. Will you state what you mean, or explain in what sense they [120] are company employees?

"A. Well, they are hired by the month. The men that work on the gear and make up the fish gear are hired by the month or by the hour, and they work at that work during the season there.

"Q. But they are not the men that go out on the boats, however, are they?

"A. The men that go out on the boats are hired—a few of them—these that want to, are hired and paid by the hour for that work.

"Q. To fish?

"A. No, to make up the gear; to get the gear ready.

"Q. But not actually to fish?

"A. Not to fish. They are paid by the fish when they fish.

"Q. You really have no company employees who are engaged solely in fishing?

"A. No.

"Q. Do you have any contract agreements with the unions relative to the fishermen that you en-

"Q. Doesn't that differential go towards the purchase of the boat?

"A. You see, that is for a contract boat.

"Q. Yes.

"A. But a company boat is owned outright by the company. There is not anybody purchasing that boat.

"Q. Oh, I see.

"A. You asked about a company boat. What we receive for our equipment that we furnish the boat—gear and everything—is really derived from the difference in the two prices. But a contract boat, that is that man's boat. He gets his independent price for the fish. It is turned over to him just like it is his own. [137]

"Q. Now, do I understand the independent fisherman owns his boat and gear?

"A. He owns everything.

"Q. The company gear fisherman is buying the boat—

"A. (Interposing): The contract fisherman is buying the boat.

"Q. All right.

"A. The company gear fisherman owns nothing. That is, the company owns it all. The contract fisherman, that has just developed within the last few years. He is between the two. He is buying his boat.

"Q. Where the fishermen are buying the boat on contract, is the master usually in on that contract?

"A. He is the master—it is sold to one man.

"Q. Oh, I see.

"A. The master of the boat.

gage, either as independent fishermen or as company gear fishermen?

"A. Well, we are under the jurisdiction of the Fishermen's Union up there, and it is distinguished in the contract, the price that is paid to company gear fishermen and the price that is paid to independent fishermen, but they are all under the jurisdiction of the union:

"Q. But that is restricted entirely to the price to be paid for the fish? [121]

"A. Yes.

"Q. That does not go into the matter of working hours?

"A. Yes. The union sets how much an hour we should pay them if they are employed ashore.

"Q. If they are employed ashore?

"A. Yes.

"Q. The union does not tell you by way of contract what kind of living conditions you are to provide for the fishermen on the boats?

"A. No, sir.

"Q. On any of the boats?

"A. No, sir.

"Q. And now, you have spoken of these company gear boats that are being purchased by what you have termed company gear fishermen. In the case of loss or damage of any kind to that type of boat, who stands the loss?

"A. The boat is insured.

"Q. By whom?

"A. And the fisherman pays the premium.

"Q. The fishermen pays the premium?

"Q. Well, he is not an employee of yours either, then, is he?

"A. No. He is an independent fisherman.

"Q. On the company owned boats do you regard the master as an employee of the company?

"A. I am not qualified to answer that.

"Q. You stated that to a certain extent you controlled the place of fishing by the contract boats. Will you state to what extent that is?

"A. Well, that depends on the individual. If we have got a man running a boat who is very co-operative, why he will fish where [138] we want him to, and others that are not cooperative, or run off on their own and go here and there any everywhere, we try to control them on account of the tender service, which means picking up of the fish.

"Q. Oh, I see.

"A. But that depends on the individual. Some fellows want to run all over the country, and others will stick around where they can deliver their fish.

"Mr. Arend: That is all.

"Mr. Arnold: That is all.

"(Witness excused.)" [139]

"DEPOSITION OF FRANK E. McCONAGHY

"Frank E. McConaghy, called as a witness on behalf of the Plaintiffs, having been first duly sworn by the Commissioner, was examined and testified as follows:

"Direct Examination

"By Mr. Arnold:

"Q. Please state your name and address.

"A. Yes, and we show it as a joint—well, we show it in the policy as our interest appears.

"Q. Just like a mortgagee would name himself in the insurance policy?

"A. Yes. [122]

"Q. Along with the mortgagor?

"A. Yes, sir.

"Q. Do these company gear fishermen usually own the boat by the end of the season?

"A. No. It does not work quite that fast.

"Q. It doesn't work quite that fast?

"A. It is pretty fast, but it is not quite that fast.

"Q. Mr. Bailey, with reference to the men who fished in 1946 in the Karluk restricted area as company gear fishermen, how many men would there be to a boat?

"A. There would be an average of three, and some of them have four men to a boat.

"Q. Now, can you state what words were actually used by way of threatening the company in its operations at Karluk, or the men working there?

"A. Well, the Bureau of Indian Affairs threatened to seize our boats if they were caught within the area, and that would mean that that boat and that crew would lose their whole season. They would seize the boat, and if they seized the boat, that crew could not fish anywhere else. They had no boat. That was one threat.

"Q. Who made the threat?

"A. The Bureau of Indian Affairs. No, wait a minute. Maybe the Fish and Wildlife Service.

"Q. Can you be positive on that? [123]

"A. Frank E. McConaghy; 1111 Boren Avenue, Seattle, Washington.

"Q. What is your occupation?

"A. Cannery Superintendent.

"Q. What company are you employed by?

"A. Frank McConaghy & Company, Incorporated.

"Q. What is the address of that company?

"A. 512 Colman Building, Seattle, Washington.

"Q. What is your official with that company?

"A. President.

"Q. How long have you held that position?

"A. Nine years.

"Q. How long have you been engaged in the salmon canning business? A. Since 1914.

"Q. How long have you been engaged in the salmon canning business in the Territory of Alaska?

"A. Since 1916.

"Q. How long have you been engaged in the salmon canning business on Kodiak Island in the Territory of Alaska? [140] A. Nine years.

"Q. Does Frank McConaghy & Company, Incorporated, own and operate a cannery on Kodiak Island at the present time?

"A. Yes, at the town of Kodiak.

"Q. At the town of Kodiak? A. Yes, sir.

"Q. How long has Frank McConaghy & Company, Incorporated, owned and operated that cannery? A. Nine years.

"Q. What years has it operated it?

"A. From 1937 to 1946, inclusive.

"A. The Fish and Wildlife Service said that the boats would be seized.

"Q. To whom did they direct the threat?

"A. I believe I received that information from our Mr. Turner.

"Q. You mean the threat was made to Mr. Turner?

"A. Yes.

"Q. And what is his relationship to the company?

"A. He is the outside man of the Kodiak Fisheries Company. He is the outside foreman.

"Q. Does he operate any boats of his own there?

"A. Not of his own. He is in our employ.

"Q. But he does not actually fish for you?

"A. No.

"Q. And he is the only man of your company who received a threat? Is that the way you wish it now to go in the records?

"A. No. I have something here on that too (looks at file). Mr. Jenkins had a conversation with Mr. Meyer, the warden for the Fish and Wildlife Service at Kodiak, and Mr. Meyer left no doubt that he would attempt to enforce the regulation pertaining to the Karluk district. As I understand it, that regulation meant a seizure of the boats—the arrest of the fishermen and seizure of the boats.

"Q. And who is Mr. Jenkins?

"A. Mr. Jenkins is our superintendent at the Port Bailey cannery.

"Q. Is he here in Seattle now? [124]

"A. He is in Seattle, yes.

"Q. And it operate! it during the season of 1946? A. Yes, sir.

"Q. Frank McConaghy & Company, Incorporated, is a corporation? A. Yes.

"Q. Organized under the laws of what state, do you know? A. The State of Washington.

"Q. What is the approximate value of the plant and shore facilities of your plant at Kodiak?

"A. \$85,000.

"Q. \$85,000? A. Yes, sir.

"Q. What is the approximate investment in tenders, fishing gear and other equipment used in the taking of the fish?

"A. About \$45,000. [141]

"Q. What is the approximate sum which Frank McConaghy & Company, Incorporated, expended by way of pre-season expenditures at your plant at Kodiak in preparation for the 1946 fishing season? A. Approximately \$115,000.

"Q. State, if you know, the number of employees, as distinguished from fishermen, transported to the cannery from points outside of Alaska for the 1946 season. A. About forty-six.

"Q. State the number of fishermen that you transported to Kodiak from points outside of Alaska. A. Four.

"Q. That is for the 1946 season? A. Yes.

"Q. State the total number of fishermen that you utilized in connection with the 1946 operation.

"A. About sixty-eight.

"Q. Does Frank McConaghy & Company, Incorporated, operate company owned boats—com-

"Q. Do you have a written contract with the company gear fishermen regarding the purchase of the boats?

"A. With those who purchase boats, yes, we have.

"Q. A written contract?

"A. Yes.

"Q. Do you have such a contract here?

"A. The contract is as follows:

/ "Conditional Sale Agreement

"This Agreement made and entered into this _____ day of _____, 194____, by and between Kadiak Fisheries Company, a corporation, of Seattle, Washington (hereinafter called "Kadiak") and _____, of _____ (hereinafter called "Purchaser"),

"Witnesseth:

"Article I. Subject Matter: Kadiak agrees to sell and Purchaser agrees to buy one purse seine boat, described as follows:

"Article II. Terms: (a) The purchase price for said boat is \$_____, payable as follows: Upon the [125] execution of this agreement Purchaser shall pay \$_____. The balance of the purchase price shall be paid as follows:

"20% at the close of the 194____ fishing season,

"20% at the close of the 194____ fishing season,

"20% at the close of the 194____ fishing season,

"20% at the close of the 19____ fishing season,

"20% at the close of the 19____ fishing season.

“(b) Interest on deferred balance shall be six per cent (6%) per annum payable ten (10) days after the close of each fishing season, which interest may be waived by Kadiak. A waiver of said interest for one year by Kadiak is not to be construed as a waiver of interest by Kadiak for any subsequent year.

“Article III. Restrictive Use: (a) Purchaser agrees until the purchase price has been fully paid, to use or make available said boat during the salmon fishing season exclusively for the benefit of Kadiak in the fishing waters in and off the Territory of Alaska.

“(b) Purchaser shall be paid for any fish sold to Kadiak at the prevailing rate paid independent fishermen for the particular season.

“Article IV. Repurchase: Upon the death of Purchaser, if the purchase price has not yet been fully paid, Kadiak shall have the right to repurchase said boat from Purchaser's heirs, executors or administrators upon payment of a [126] sum equal to the principal payments made by decedent during his lifetime on the purchase price of said vessel, less any sums needed to place said vessel in as good condition as when purchased, excepting reasonable ordinary wear and tear.

“Article V. Miscellaneous: Until the purchase price is fully paid, Purchaser agrees to:

“(a) Permit no maritime lien, or liens of any kind or nature whatsoever, to attach to said boat. In the event that any lien should attach to said boat, Purchaser agrees to remove

the same within ten (10) days after said lien has attached to the boat.

“(b) Notify Kodiak as to the use or location of the boat at all times when said boat is not being used for the benefit of Kodiak. In no event may the boat be removed from the immediate area of Kodiak Island, Territory of Alaska, without the written permission of Kodiak.

“(c) Maintain and keep said boat in good condition and repair.

“(d) Pay all property taxes or any other taxes or license fees assessed or imposed on said boat.

“Article VI. Insurance: Kodiak agrees to keep said boat fully insured until the purchase price is fully paid. Purchaser agrees to reimburse Kodiak for the cost of maintaining said insurance. In the event of loss, the insurance proceeds shall be used first to pay Kodiak the unpaid balance of [127] purchase price; excess insurance proceeds shall be payable to the Purchaser.

“Article VII. Title: The property in the said boat shall vest in the Purchaser only upon payment in full of the whole of the said price as herein provided, and only upon complete performance by the Purchaser of all of the other terms and conditions herein set forth upon the part of the Purchaser to be kept observed and performed.

“Article VIII. Nonassignable: This contract shall not be assignable without first obtaining the written consent of Kodiak. Purchaser shall not part with possession of said boat, or sell, or attempt

to sell, mortgage or pledge, or otherwise dispose of, his interest in said boat, without first obtaining the written consent of Kadiak.

“Article IX, Default: (a) In the event of failure to make any payment of principal or interest or in the event of the breach of any covenant, promise or obligation herein contained, or if a debtor's relief proceeding in bankruptcy, receivership or insolvency shall be instituted or filed by or against the Purchaser as a debtor, bankrupt, defendant or insolvent, or if the Purchaser shall enter into any arrangement or composition with his creditors, a full amount of the purchase price then remaining unpaid shall at the option of Kadiak be immediately due and payable, anything to the contrary thereof notwithstanding; but the exercise of such option by Kadiak [128] shall not transfer the property in the said boat to the Purchaser, it being expressly agreed that the property in the said boat shall vest in the purchaser only on the payment of the full purchase price, and on the performance by the Purchaser of the terms and conditions hereof on his part to be kept, observed and performed.

“(b) If the Purchaser shall fail to keep, observe and perform any of the terms of this agreement contained on his part to be kept, observed and performed, then, and in such event, Kadiak shall have the right to take immediate possession of the said boat and, for such purpose, Kadiak may enter upon any premises where the said boat may be, and

may remove the same therefrom with or without notice of intention to retake.

“(c) If under the terms hereof Kadiak shall have the right to retake possession of the said goods, Kadiak, before retaking possession thereof, may, not more than forty (40) days or less than twenty (20) days prior to the date of such retaking, serve upon the purchaser personally or by registered mail a notice of intention to retake the boat on account of the Purchaser's default, specifying therein the default and the period at the end of which the boat will be retaken, and notifying the Purchaser of his rights in case said boat is retaken; and, upon the service of a notice of such intention to retake and upon the purchaser's failure to perform the obligations in respect to which he shall have made default before [129] the day set for retaking, Kadiak may retake the goods and shall hold them subject to resale, free and clear of any right of redemption on the part of the Purchaser.

“(d) If Kadiak shall elect not to give notice of intention to retake as permitted in and by the next immediately preceding paragraph hereof, Kadiak shall retain the goods for ten (10) days after retaking the same and, during such period, the Purchaser, upon payment or tender of the amount due under this contract, at the time of retaking, together with interest and/or upon performance or tender of performance of such other terms and conditions as are conditions precedent to the vesting of the property in the purchaser, and upon pay-

ment of the expenses of retaking, keeping and storing, may redeem the goods and become entitled to take possession of them, and to continue the performance of the contract as if no default had occurred.

“(e) If the Purchaser shall have paid at least fifty (50%) per cent of the purchase price at the time of the retaking and if the Purchaser shall not redeem the goods within ten (10) days after Kadiak shall have retaken possession thereof, Kadiak shall sell the same at public auction in the Territory of Alaska where the boat was at the time of the retaking, by sale held not more than thirty (30) days after the retaking; but if the Purchaser shall not have paid at least fifty (50%) per cent of the purchase price at the time of [130] retaking, Kadiak shall not be under a duty to resell the goods as prescribed in the instant paragraph hereof, unless the Purchaser shall serve upon Kadiak within ten (10) days after the retaking, a written notice demanding a resale, delivered personally or by registered mail; and if there shall be no resale, Kadiak may retain the goods as its own property without obligation to account to the Purchaser, and the Purchaser shall be discharged from all further obligations.

“(f) In the event of a resale as herein provided, the proceeds of the resale shall be applied (1) to the payment of expenses thereof, (2) to the payment of the expenses of retaking, keeping and storing the goods, (3) to the satisfaction of the balance due under this contract, rendering the over-

per cent. That is, on the even cycle. So in 1945, which is an odd year, it would be 35 per cent that year, and 1946, an even year, it would be 50 per cent then. There are more fish on the west side of Kodiak Island in the even years than there are in the odd years.

"Mr. Arend: That is all.

"Mr. Arnold: I have just a couple of, more questions.

"Redirect Examination

"By Mr. Arnold:

"Q. Reference was made to Mr. Turner. What is Mr. Turner's full name, and what is his capacity with your company?

"A. Charles Puget Turner. He is outside foreman of the Kodiak Fisheries Company. [133]

"Q. What are his duties?

"A. Well, he is in charge of fishing gear and all fishermen.

"Q. Does he work under your direction?

"A. He works under the direction of Mr. Jenkins.

"A. Does Mr. Jenkins work under your direction?

"A. Mr. Jenkins works under my direction.

"Q. Mr. Bailey, coming back to the question of company boats and gear, if a company boat and its gear were seized for fishing within the Karluk Indian Reservation without a permit, and the boat were forfeited to the United States pursuant to the enforcement provisions of the laws relative to the

conservation and regulation of the Alaska Fisheries, who would suffer the financial loss, the Kadiak Fisheries Company or the members of the crew of the vessel?

"A. The Kadiak Fisheries would suffer the financial loss on a company owned boat.

"Q. The six boats that you mentioned as being company boats—company owned—have you contracted to sell those to the fishermen who fish on them? A. No.

"Q. I believe you mentioned eight contract boats.

"A. Yes, sir. There are eight contract boats.

"Q. Will you explain the difference between the ownership and title of the company owned boats and the contract boats?

"A. Well, the company owns the company boats outright. The company [134] on the other boats, on the contract boats—the company has built them and sells them to the fishermen on contract. The boats are held in the company's name until they are paid for. They show in the company's name until they are paid for, and when they are paid for, why the documents will be turned over to the fishermen who have paid for them.

"Q. Those boats are sold on condition sales?

"A. Those boats are on conditional sale, yes.

"Q. And the title is reserved in the Kadiak Fisheries until the purchase price is paid?

"A. Yes, that is right.

"Q. What about the gear on the company boats

pany owned fishing boats? A. We have four.

"Q. Approximately how many company fishermen on each boat?

"A. They average about three. Twelve men altogether.

"Q. Do you have contract boats?

"A. Yes.

"Q. How many? [142] A. We have six.

"Q. Will you explain briefly the circumstances and the relationship of the contract boats and contract fishermen with your company?

"A. Well, we built the boats and financed them and the boat gear, and then sold them to the captain or the purchaser of each boat under a contract agreement.

"Q. Who holds the title to those boats?

"A. They do. And then we have a preferred marine mortgage on the boat.

"Q. Do you also purchase fish from independent fishermen? A. Yes.

"Q. Independent boats? A. Yes.

"Q. How many?

"A. We have had about eight this year—eight independents—full independents.

"Q. By 'full independents' do you mean boats on which you have no title? And hold no preferred marine mortgage?

"A. On which we have no interest—in which we have no interest at all. We have no interest in them at all.

"Q. Will you state, generally, what the opening and closing dates for commercial fishing on Kodiak Island have been in 1946 and previous years?

"A. In 1946 it was from June 1 to August 13, of course, in the [143] general area, and then in the Karluk area it is open, unless it is closed for escapement purposes, until the 30th of September.

"Q. Will you state how the escapement is controlled at Karluk, and how the opening and closing dates are determined?

"A. Well, the escapement is at the weir count. If the total of the catch as turned in by all of the canneries fishing in that area do not exceed the count at the weir, why then we continue. But if the catch exceeds the count at the weir, then fishing is usually suspended until that escapement count is up.

"Q. Explain how the weirs are operated and how the fish are counted, and what becomes of the fish that are counted through the weir.

"A. The weir is constructed across the river and so arranged so that it leads the fish into a gate or door, and that is open, and as the fish go in they are counted. And the fish proceed then into the lake—Karluk Lake, supposedly for spawning purposes, and stay there.

"Q. Is any commercial fishing allowed above the weir? A. No, not that I know of.

"Q. State during the years prior to, but not including 1946, whether your operations on Kodiak Island were interfered with in any manner by the Karluk natives or by the Office of Indian Affairs."

Mr. Berrett: Your Honor, we wish to offer the same [144] objection to this question as was previously raised.

The Court: Same ruling.

"A. They were not interfered with other than when the reservation was set and the markers were established there, and then we were supposed to keep out of that area.

"Q. Did the Karluk natives or the Office of Indian Affairs threaten prosecution or seizure, or indicate that they would take action of that nature if the boats did not fish within those markers?"

Mr. Berrett: If the Court please, I wish to entertain the same objection.

The Court: Same ruling.

"A. We were notified in the general setup of the reservation what the boundaries would be, and if our boats went in above those lines, why they were subject, of course, to prosecution.

"Q. In what year did that first occur?"

"A. In 1944.

"Q. What happened in 1945?"

"A. The same thing. That is, the markers were established and we were supposed to keep outside of those particular markers."

Mr. Berrett: We object, your Honor, to the question just answered and also the one previously; the one "In what year did that first occur?" and now as to what happened in 1945.

The Court: Objection overruled.

"Q. What arrangement, if any, did the Office of Indian Affairs [145] make in 1945 to enforce the regulation relative to the Karluck Indian Reservation?"

Mr. Berrett: If the Court please, I object to this question on the same grounds.

The Court: Objection overruled.

"A. Well, the markers were set out, and I think it was Mr. Mueller who was up at Karluk to see that the regulation was enforced, and we were to keep out from the markers that were set up for the Karluk natives.

"Q. Who is Mr. Mueller?

"A. He was the Indian Agent of the Department of the Interior.

"Q. What is his first name? A. Louis.

"Q. Louis Mueller? A. Yes, sir.

"Q. Was there any effort made to interfere with your operations within the Karluk Reserve in the year 1946?"

Mr. Berrett: I object to this question, your Honor.

The Court: On what ground?

Mr. Berrett: On the same ground. It is incompetent, irrelevant and immaterial. Oh, pardon me. I withdraw that objection.

The Court: On what ground?

"A. None. Of course, markers were set up again, and we were supposed to stay outside of them. And, of course, there was a [146] threat of enforcement there as set out in the regulation.

"Q. Are you acquainted with Mark Meyer of Kodiak? A. Yes.

"Q. What is his official position, if you know?

"A. He is a fish warden for the Fish and Wildlife Service.

"Q. Over what area is he warden?

"A. The Kodiak area.

"Q. All of Kodiak Island? A. Yes.

"Q. Did you have any conversation with Mark Meyer in 1946? A. Yes.

"Q. Relative to the enforcement of the regulation prohibiting fishing within the Karluk Reserve by fishermen other than inhabitants of the Reserve or persons authorized by them?

"A. Meyer came down to the cannery on or about the 26th or 27th of May and showed me a wire that he had received from Hynes of the Fish and Wildlife Service, setting out the enforcement proceedings for him to carry out.

"Q. State what Meyer said at that time relative to the intention of the Fish and Wildlife Service to enforce the regulation within the Karluk Reserve.

"A. He just told me that he had received instructions, which he let me read, and he said that he did not have, of course, enough help or the money to enforce it, but he would have to do it anyway.

"Q. I call your attention to Plaintiffs' Exhibit 4. Can you state whether or not the wire Mr. Meyer showed you as having been received from Frank Hynes, the Defendant in this case, was in substance the wire set forth in Plaintiffs' Exhibit 4?

"A. The language is practically the same as I remember it.

"Q. Did you have any talk with Mr. Louis Mueller in 1946 concerning the Karluk Reserve?

"A. Mr. Mueller was at the cannery prior to going to the Karluk village, and at that time he told me that he and Mr. Brunskill were appointed spe-

cial agents by the Fish and Wildlife Service for enforcement of the regulation; to assist in the enforcement of the regulation.

"Q. What regulation did he refer to?

"A. The regulation of the Fish and Wildlife Service with reference to fishing at the Karluk Indian Reservation.

"Q. About what date was that conversation?

"A. I cannot recall just the exact date, but it was the early part—well, somewhere around the 10th or 15th of June—somewhere in there.

"Q. Could you state definitely whether that conversation occurred before or after the 23rd of June?

"A. It was before; around that time. He was at our cannery too, by the way, for luncheon—he and Mr. Brunskill on the 23rd of June.

"Q. Well, had it been prior to that date or subsequent to that [148] date that he informed you that he was deputized by the Fish and Wildlife Service to enforce the Karluk regulation?

"A. He was there, oh, about a week or so before that time, and it was during his visit in Kodiak that he told me.

"Q. You say, "before that time." You mean before what time? A. Before the 23rd.

"Q. Before the 23rd of June? A. Yes.

"Q. Did you receive any communication from Mr. Mueller or Mr. Brunskill about that time?

"A. Later in the month I received a letter from Mr. Mueller and Mr. Brunskill asking, or advising me, that they had instructed the Postmaster at Kodiak to deliver mail to me in order to send it out

to them on our cannery tenders. And, of course, he told me then that they had received notice of the injunction at Fairbanks or the trial at Fairbanks.

"Mr. Arnold: I will ask to have this marked as Plaintiffs' Exhibit 6 for identification, Mr. Commissioner.

"(Thereupon, the document above referred to was marked Plaintiffs' Exhibit 6 for identification.)

"Q. (By Mr. Arnold): Mr. McConaghy, I hand you Plaintiffs' Exhibit 6 for identification, and I will ask you if that is the letter that you received from Mr. Mueller and Mr. Brunswick and that you referred to in your last answer?

"A. Yes, it is. [149]

"Q. What date does that letter bear?

"A. June 29, 1946.

"Mr. Arnold: I will ask to have the letter admitted in evidence.

"Mr. Arend: I will interpose the usual objection. The objection, of course, is reserved until the time of trial, and so I am not making it now. I mean, I am reserving the usual objection."

Mr. Arnold: We offer Plaintiffs' Exhibit 6 in the deposition as Plaintiffs' Exhibit E in this case.

Mr. Berrett: No objection.

The Court: It may be admitted.

(Plaintiffs' Exhibit 6 for identification in the deposition was marked as Plaintiffs' Exhibit E in this cause by the clerk of the court.)

“Q. (By Mr. Arnold) Will you read the letter, Mr. McConaghy, into the record?”

“A. The letter is on the stationery of the United States Department of the Interior, Office of Indian Affairs, and it reads as follows:

“ ‘Karluk, Alaska,
June 29, 1946.

Mr. Frank McConaghy,
Kodiak, Alaska.

My dear Mr. McConaghy:

“ ‘Attached hereto is a letter addressed to the Postmaster [150] at Kodiak authorizing delivery to you of any mail held there pending transmittal to Karluk: Would it be too much of an imposition to forward this mail to us via the first convenient tender boat.

“ ‘We were advised by wire yesterday of the temporary restraining order issued by the District Federal Court at Fairbanks but our instructions were not altered so we will remain on duty here pending the outcome of the hearing set for July 8 at Fairbanks.

“ ‘Thanking you for your assistance in the premises and with very kindest personal regards we beg to remain,

Sincerely yours.’

“And it is signed, ‘Louis C. Mueller, Chief Special Officer,’ and ‘W. G. Brunskill, Special Officer.’

"Q. Mr. McConaghy, do your boats fish in the area covered by the Karluk Indian Reserve?"

"A. Yes.

"Q. For how many years have your boats fished there?"

A. Nine years.

"Q. Your boats have fished there for nine years?"

A. Yes, sir.

"Q. Will you state whether or not you have examined the records of your company for the purpose of determining your total catch and pack from the years 1941 to 1946 inclusive by species, and the total catch and pack for those same years by species taken within the Karluk Reserve? [151]

"A. I have.

"Mr. Arnold: I will have this marked as Plaintiffs' Exhibit 7 for identification.

"(Thereupon the document above referred to was marked Plaintiffs' Exhibit 7 for identification.)

"Q. (By Mr. Arnold) I hand you Plaintiffs' Exhibit 7 for identification and ask you to state what the exhibit consists of.

"A. It consists of the total catch and pack of fish caught and processed in our cannery at Kodiak, and also the total catch and pack as taken from the Karluk Indian Reservation.

"Q. For what years?"

"A. 1942, 1943, 1944, 1945 and 1946. The pack in the general area covers 1941 also, but I did not have the figures available for 1941 other than that. They are at the cannery.

"Q. State whether or not that data contained in Plaintiffs' Exhibit 7 was compiled under your direction. A. It was.

"Q. What is the source of the information?

"A. Our records in the office—books.

"Mr. Arnold: We offer the exhibit in evidence."

Mr. Arnold: If the Court please, at this time we offer Plaintiffs' Exhibit 7 of the deposition as Plaintiffs' Exhibit F in this case.

Mr. Berrett: No objection.

The Court: It may be admitted. [152]

(Plaintiffs' Exhibit 7 for identification in the deposition was marked Plaintiffs' Exhibit F in this cause by the Clerk of the Court.)

Mr. Medley: I propose that the exhibit be considered as read and not read, if agreeable to counsel.

Mr. Berrett: We so stipulate.

The Court: Very well.

"Q. (By Mr. Arnold) How many fish did you receive from within the Karluk Reserve during the season of 1946? A. 528,598.

"Q. How many during the season of 1945?

"A. 57,248.

"Q. How many during 1944? A. 120,175.

"Q. Will you read the figures for 1943 and 1942?

"A. 1943, 125,734; and 1942, 109,907.

"Q. Mr. McConaghy, what would be the effect on the operations of your Kodiak cannery if your boats were prohibited from taking fish within the Karluk Reserve?

"A. Well, this year it would have amounted to about sixty or sixty-five per cent.

"Q. Of your total pack?

"A. Of our total pack. Previous to that, around thirty or thirty-five per cent.

"Q. What would be the financial effect on your operations if you are prohibited from the area?

"A. Well, it would be rather disastrous for us. At the outset of the season, in June, if we are prohibited from fishing in the Karluk area, it would limit the fishing almost altogether outside of a little around Litlik.

"Q. State whether or not you could replace your present production from the Karluk Reserve with fish from some other area.

"A. That would be almost impossible because we are fishing in all other areas that we can possibly reach now.

"Q. Mr. McConaghy, if your boats are prohibited from taking fish within the Karluk Reserve, can you continue a profitable operation at the Kodiak plant? — A. I doubt it.

"Q. Mr. McConaghy, will you explain the difference in the three categories of fishermen used at your plant, namely, the company fishermen, the independent fishermen and the contract fishermen? Describe each group and your relationship with them?

"A. Well, the company fishermen—in that case we furnish the boat; gear; gasoline and oil—in fact, everything. And in the case of contracts, that is, where we are selling the boat, they are paid the full

independent price and the boat earnings, that is, the difference between the company and independent price is applied on the purchase price of the boat.

"They have full jurisdiction of the boat to go and fish where they please, just the same as the independent boat. [154]

"The independent boat owns everything itself, and all that we do is buy their fish and pay them the independent price for fish as set out in the fishermen's agreement with the union.

"Q. Going back to the company fishermen, how are they selected, and what control do you exercise over them?

"A. We usually select the captain and we let him select his fishing partners. Of course, they have got to be agreeable to us. They have got to be somebody that is really worthwhile.

"Q. On your company boats do you retain the right to approve or disapprove of the selection of the crew made by the master?

"A. To some extent. It has got to be agreeable to us—naturally—when you are turning over the boat and gear to them.

"Mr. Arnold: That is all.

"Cross Examination

"By Mr. Arend:

"Q. Mr. McConaghy, how far is the Kodiak cannery from the Karluk Reservation, in miles?

"A. Approximately eighty-five miles.

"Q. And what is the furthest distance that your boats operate from the cannery?

"A. The furthest distance is about a hundred and thirty miles.

"Q. Where would that be?

"A. Down at Red River. That is below Karluk.

"Q. Do you have any investments at Karluk other than the floating equipment? [155]

"A. No.

"Q. Can you give us the names of the boats that were actually fishing for your company at Karluk this year?

"A. Those fishing in the Karluk area in 1946 and their crews are as follows:

"Company Boats

"FM-2 Crew: Speriden Agick, Pete Kna-gin, Martin Panamaroff.

"FM-5 Crew: Lars Larsen, Pete Borseth, Henry Neseth.

"FM-6 Crew: Sedan Thomas, Fern Riley, Pete Nehrasoff.

"Starfish Crew: John Chase, Harold Leite, Nick Pauloff.

"Contract Boats

"Lois V Crew: Dal Valley, Bill Bailey, Wm. Coles, Bruce Coles.

"FM-3 Crew: Lawrence Panamaroff, George Panamaroff, Wm. Robertson.

"Sea Bird Crew: Wm. Sorgent, Oscar Hagen, George Heitman, Bill Hubley.

"Ripple Crew: Henry Norton, Cecil Wilson, Leornel Shurauloff.

"Isla Mae Crew: August Heitman, Joseph Malutin, Laurence Lytel. [156]

"Swallow Crew: Pat Cannon, Larry Cameron, Walter Mueller.

"Independent Boats

"Zephyr Crew: Joseph M. S. Corniech, Jowb Alpeeik.

"Elizabeth Crew: John Malutin, Lars Panamaroff, Carl Sautner.

"Iola Crew: Emil Christoffersen, Bill Carter, Chas. Christoffersen.

"Martha Jeame Crew: Jack Petaja, Mary Petaja, Ed Sargent.

"Beoma B Crew: W. O. Grube, Herbert Lenther, John Morrison.

"Seabiscuit Crew: Orviel Larson, Fred Mahle, Tim Chernoff.

"31-D-182 Crew: Bell Sundberg, Ed Johnson.

"Q. When did your company first operate around Kodiak itself—the island, I mean?

"A. 1937.

"Q. And you commenced right away in Karluk—

"A. (Interposing): We started in Zacker Bay, a little floating cannery, and then moved it into Kodiak in the fall of 1937, and we have been there ever since.

"Q. Do you employ any of the natives residing at Karluk as fishermen on your boats? [157]

"A. We had one boat with Karluk natives this year and last year, too.

"Q. What type of boat was that of these three that you have mentioned? A. Company.

"Q. Company owned?

"A. Company owned and company gear.

"Q. Who was their captain?

"A. Speriden Agick.

"Q. A native? A. Yes.

"Q. Were they young men or old men?

"A. They were young men.

"Q. Your company buys fish, too, from the seine fishermen at Karluk? A. No.

"Q. You don't?

"A. You mean from the beach seines?

"Q. Yes, the beach seines.

"A. No, we did not buy any.

"Q. Do you regard the men fishing on the company owned gear as employees of the company?

"A. Like Mr. Bailey, I am not qualified to say on that.

"Q. You have never definitely decided that they are employees, have you? [158] A. No.

"Q. Mr. McConaghy, how do you pay the fishermen on the company owned boats?"

The Court: Stop there and we will take a recess until two o'clock.

(Thereupon an adjournment was taken at twelve o'clock M., October 28, 1946, until two o'clock P.M., October 28, 1946, at which time court was duly reconvened.)

The Court: Are counsel ready to proceed in this case?

Mr. Berrett: Ready, your Honor.

Mr. Arnold: We are ready.

The Court: You were reading cross-examination.

"Q. Mr. McCónaghy, how do you pay the fishermen on the company-owned boats?

"A. How are they paid?

"Q. How are they compensated for their work?

"A. At a certain price per fish.

"Q. And how does that compare with the price paid independent fishermen?

"A. It is about one-third less.

"Q. As a matter of fact, the third that you retain compensates you for the use of the gear, does it not?

"A. For the gear and the operation of the boat; the repairs to the boat, and for the gas and oil and gasoline.

"Q. Do you have a contract with the labor union as to the hours a [159] man has to work per day, and as to the living conditions provided by the company for the fishermen?

"A. For the fishermen?

"Q. Yes.

"A. There is a contract that we have as to what we will pay per hour, if we use them ashore in pre-season and post-season work, and then the price of the fish during the fishing season.

"Q. When they are working on the boat they are paid—that is, they get a price per fish, and that is governed by the union contract, is it?

"A. That is correct.

"Q. You have stated that these boats that the company built and that are operated by fishermen, and are being purchased by the fishermen, title goes to the fishermen, but you have a mortgage. In case of loss of the boat, of course the fishermen lose?

"A. The boat is insured.

"Q. Who pays for the insurance?

"A. The fishermen.

"Q. And the names of the fishermen that you have given us are the fishermen who worked on company owned gear during 1946 in the Karluk reservation—I am referring to company boats now?

"A. Yes.

"Q. Have you ever heard a threat made by the Department of Interior or any of its agents against any particular boat [160] engaged in fishing for your company?

"A. No, there has not anything come to my knowledge other than the general enforcement regulation.

"Q. Did I understand you to say that there were eighteen boats altogether fishing for you in the Karluk area?

"A. I didn't say how many in the Karluk area.

"Q. Oh, you did not limit these to the Karluk area. You said you had four company owned boats?

"A. Yes, sir.

"Q. And six boats that were being purchased?

"A. Yes.

"Q. And eight independent boats?

"A. Yes.

"Q. And how many of those were fishing in the Karluk area?

"A. The list that I have read off to you, all of those boats were fishing in the Karluk area in 1946.

"Q. Were any of those boats seized during the 1946 season by the Department of the Interior or its agents? A. No.

"Q. Were any of the fishermen engaged in fishing for your company arrested during the 1946 season? A. No.

"Q. Were any of the fishermen engaged in fishing for your company arrested during the 1946 season? A. No. [161]

"Q. Were any boats seized or arrests made in 1945 in the Karluk Reservation area?

"A. Not of ours.

"Q. Not of yours? A. No, sir.

"Q. Can you state as to the other companies fishing there? A. No, I can not.

"Q. Do you know of any arrests that were ever made—do you personally know of any arrests made in 1944 or 1945?

"A. None to my knowledge.

"Q. Do you know of any boats seized, or gear seized during 1944 or 1945 by the Indian Service or its agents? A. Not that I know of.

"Q. Was this Mr. Brunskill present when Mr. Mueller advised you of his deputization?

"A. I don't recall whether he was or not.

"Q. Did Mr. Brunskill ever tell you that he was personally deputized? A. No.

"Q. He did not? A. No.

"Q. Had you contemplated the hazards to your company in case the Karluk area were closed entirely to fishing—to reservation residents as well as to the general public?

"A. We never thought about—we have never thought about the [162] conditions that might arise—that is, the unprofitable part of the operation.

"Q. Would that, do you think, cause the company to cease fishing operations entirely if that should happen?

"A. In fact, we have offered the cannery for sale, contemplating that something maybe might come up.

"Mr. Arend: I see. No further questions.

"Redirect Examination

"By Mr. Arnold:

"Q. Mr. McConaghy, you say that these contract boats were insured? A. Yes.

"Q. Does that insurance protect the owner or you as the mortgage holder against loss in case of seizure for violations of the Fisheries' regulations?

"A. No. It is just the usual marine hazards.

"Q. In the event one of those vessels are seized and forfeited to the United States pursuant to the provisions of law relative to enforcement of the Fisheries' regulations, what would become of your security? A. That is the question.

"Q. You consider that you would have a financial loss in the event that that occurred?

"A. Well, that would depend entirely upon the honesty of the fishermen to continue working and paying the balance of their obligation over a period of years. [163]

"Q. Do you think that this fisherman or do these fishermen have resources to carry an obligation of that kind in case the security was lost?"

Mr. Berrett: If the Court please, I would like to interpose an objection to that question as calling for a conclusion of the witness. He could not possibly know the financial condition of these fishermen.

Mr. Arnold: If the Court please, I think it would be a conclusion if he were not in a position to know, but the relationship of debtor and creditor exists between them. He has previously testified to it, that he sold these fishermen vessels and has taken mortgages back. I think it is a fair assumption that he knows something of their resources, of their financial resources, and credits and their responsibility. The question was asked in the sense of asking him to testify from his own knowledge.

The Court: Objection sustained.

"Q. Now, going to the year 1946, and to a question asked on cross examination about seizures or arrests, you say that there were none?"

"A. None as far as our company was concerned.

"Q. Now, you testified that by regulation the fishing season opened at Karluk on June 1st. Is that correct?"

"A. That is correct.

"Q. When did fishing actually commence at Karluk? [164]

"A. We were tied up by a fishermen's strike for awhile. It actually started, I think, around the 17th of June.

"Q. And how long did it continue, if you know?

"A. It continued—it was closed the early part of July—I think around the 8th of July.

"Q. But there was no fishing prior to June 17th?

"A. Nothing—no canning was done.

"Mr. Arnold: That is all.

"Recross Examination

"By Mr. Arend:

"Q. Is it possible to catch the fish before they come into the three thousand foot area that was reserved?

"A. Not at Karluk. That is right out in the Shelikof Straits. There is no fishing done successfully outside of that limit.

"Mr. Arend: That is all.

"Mr. Arnold: That is all.

"(Witness excused.)" [165]

"F. A. GEPNER

"called as a witness on behalf of the plaintiffs, having been first duly sworn by the Commissioner, was examined and testified as follows:

"Direct Examination

"By Mr. Arnold:

"Q. State your name and address.

"A. F. A. Gepner, 2509 34th Avenue South, Seattle.

"Q. State your occupation.

"A. Cannery superintendent.

"Q. By what company are you employed?

"A. Parks Canning Company, Incorporated.

"Q. How long have you held the position of superintendent for the Parks Canning Company?

"A. Five years.

"Q. Where is the plant of which you are superintendent of the Parks Canning Company located?

"A. It is located fourteen miles up Uyak Bay.

"Q. Where? A. On Kodiak Island.

"Q. How long have you been employed in the salmon canning business? A. Since 1913.

"Q. How long in the Territory of Alaska?

"A. Since 1913.

"Q. How long has the Parks Canning Company owned and operated the plant at Uyak Bay on Kodiak Island? [166] A. Since 1940.

"Q. What years has that plant operated since it was obtained by the Parks Canning Company?

"A. 1941, 1942, 1943, 1944, 1945 and 1946.

"Q. It has operated every year since the Parks Canning Company acquired it? A. Yes, sir.

"Q. When was the plant built?

"A. It was built in 1934.

"Q. By whom? A. H. T. Domemici.

"Q. What years did the plant operate, if you know, between 1934, the year it was built, and 1940; the year it was acquired by the Parks Canning Company?

"A. From the information that I have, it was operated in 1934, 1935 and 1936. It was closed in 1937, and operated again in 1938, and closed in 1939, and operated every year since then.

“Q. What is the approximate value of the plant and shore facilities? A. \$125,000.

“Q. What is the approximate investment of the Parks Canning Company in tenders, fishing gear and other equipment? A. \$75,000.

“Q. Is that all used in connection with the Kodiak Island operation? [167]

“A. That is right.

“Q. What is the approximate sum of money expended—what was the approximate sum of money expended by the Parks Canning Company in pre-season operations for the 1946 operations at the Kodiak canning? A. Approximately \$200,000.

“Q. State, if you know, the number of employees, as distinguished from fishermen, transported to the cannery from points in continental United States in preparation for the 1946 season?

“A. Seventy-five.

“Q. State the number of fishermen transported from continental United States in 1946.

“A. Fifty-four.

“Q. State the total number of fishermen employed at the cannery during the 1946 season.

“A. Eighty-two.

“Q. As to these fishermen—the eighty-two fishermen that were used in 1946—state whether or not they all fished on company owned boats.

“A. No. About twenty-one fished on company owned boats.

“Q. How many boats does the company own and fish in connection with the cannery?

“A. Seven.

"Q. And these seven company owned boats employ how many fishermen?

"A. Three each—twenty-one altogether. [168]

"Q. Does the company have any contract boats, or contract fishermen?

"A. Well, we have two old boats that we are selling to fishermen.

"Q. That you are selling to fishermen?

"A. Yes, sir.

"Q. Is the title reserved in the company?

"A. Yes.

"Q. You also have independent—

"A. (Interposing): Yes.

"Q. You also obtain fish from independent boats?

"A. That is right.

"Q. Now, state whether during the years prior to, but not including 1946 your company's operations on Kodiak Island were interfered with in any manner by the Karluk natives, or by the Office of Indian Affairs."

Mr. Berrett: If the Court please, I object to that question as being incompetent, irrelevant, and immaterial.

The Court: Objection overruled.

"A. Well, we understood from the Office of Indian Affairs that we were not to fish—that non-Karluk resident fishermen were not to fish within certain limits of Karluk.

"Q. What year did you receive that?

"A. I recall plainly in 1945 two of my fishing

boats went to Karluk before the fishing season, and returned with a paper that I have here, and said that they had been warned not to fish in [169] that district without a permit, and asking me what to do about it.

“Q. The paper that you speak of, Mr. Gepner, is this document that I am handing you, is that right?

“A. Yes, sir, that is it.

“Mr. Arnold: I will ask the Commissioner to mark that as Plaintiffs' Exhibit 8 for identification.

“(The document referred to, consisting of two sheets, was marked Plaintiffs' Exhibit 8 for identification.)

“Q. (By Mr. Arnold): Mr. Gepner, I hand you Plaintiffs' Exhibit 8 for identification. Is that the paper that you testified that your fishermen brought from Karluk in 1945?

“A. Yes.

“Q. State what it is—generally.

“A. Well, it is an application for a permit—this one is an application (indicating) to permit the fishermen to fish in the Karluk Reservation. The other is an ordinance showing what the demands would be, or the license was to be, and also it shows what the violation would be in case they did not take out a permit.

“Mr. Arnold: We offer the exhibit in evidence.

“Mr. Arend: We have no objection.”

Mr. Arnold: At this time we offer Plaintiffs'

Exhibit 8, consisting of two sheets in the deposition as Plaintiffs' Exhibit G in this case. [170]

Mr. Berrett: We object to its admission, your Honor, because it is an ordinance of an Indian village that is not a defendant in this case, an application prepared by them which in no wise is connected with the fishing regulations. It was not included in the fishing regulations in 1945. The defendant in this case, Mr. Hynes, had nothing to do with its promulgation and nothing to do with its enforcement by agent. I contend it is immaterial in this action.

Mr. Arnold: If the Court please, no objection was made to the document at the time it was offered. No objection was made at the time the document was offered. In fact, counsel stated that the defendant had no objection to its introduction. Now, passing on to its relevancy, it is the same type of testimony objection was made to previously and the same point that was argued this morning. It is our contention that what happened there in 1944 and 1945 is relevant to this controversy, since it shows the cumulative effect of the pressure in these continued threats by various members of the Department of the Interior and its agencies to preclude the plaintiff companies from fishing in the area. It culminated in 1946, it is true, in the issuance of the fisheries' regulations and the efforts of defendant Hynes, but we contend that what went on before that and those steps that were taken or were prompted by the Department of the Interior or its agencies, the Office of Indian Affairs, and

others is relevant to this controversy, [171] as showing the background or circumstances which existed there at the time this injunctive relief was applied for.

The Court: Objection overruled. It may be admitted.

(Plaintiffs' Exhibit 8 for identification in the deposition was marked by the Clerk of the Court as Plaintiffs' Exhibit G in this cause.)

Mr. Arnold: I see no necessity of reading this. I am agreeable to have it considered as read if that is agreeable with counsel.

Mr. Berrett: I make the same objection to its being read as I make to its being offered.

Mr. Arnold: I take it that, the exhibit having been received in evidence, there is no question about our right to read it; but I now offer to waive the reading of the exhibit.

The Court: It has been admitted, and our code provides that an exhibit, when admitted, shall be read at that time or not at all. It has to be read or stipulated that it be considered read, as I view it.

Mr. Berrett: We reserve our objection, but we will consider it as having been read for the purpose of going forward.

The Court: Very well, it may be considered read then.

"Q. Do you know whether any of your fishermen paid the fee and obtained permits to fish in the Karluk area in the season of 1945?

"A. Not to my knowledge.

"Q. Do you know whether an effort was made in the year 1946 to [172] require the fishermen to pay for and obtain permits to fish within the Karluk Reserve?

"A. Yes.

"Q. Do you know whether or not any of your fishermen did obtain permits in the year 1946?

"A. Yes, there were several.

"Q. Do you have any of those permits?

"A. I have one.

"Mr. Arnold: I will ask to have these documents marked as Plaintiffs' Exhibits 9, 9-A and 9-B.

"(Thereupon the documents above referred to were marked Plaintiffs' Exhibits 9, 9-A and 9-B, respectively, for identification.)

"Mr. Arnold: I suggest that we take an adjournment at this time. It is now one o'clock.

"(Thereupon, an adjournment was taken at one o'clock p. m., October 18, 1946, to two o'clock p. m., October 18, 1946.)

"After Recess

"F. A. GEPNER,

"a witness called on behalf of the Plaintiffs, having been previously sworn, resumed the stand for further examination.

"Direct Examination

"(Continued)

"By Mr. Arnold:

"Q. I call your attention to Exhibits 9, 9-A and 9-B for identification, Mr. Gepner, and I will ask

you what the exhibits [173] are, and how they came into your possession.

"A. Well, the first is a check that was issued to one of our fishermen. The second is an ordinance, and the third is a commercial fishing permit for 1946. I received the ordinance and the fishing permit from one of my fishermen, and the check I took out of our files.

"Q. State whether or not this fishing permit is a permit to fish within the boundaries of the Karluk Reservation.

"A. It is.

"Q. And the ordinance—by whom was the ordinance purported to be adopted?

"A. It is signed by the—

"Q. (Interposing): By the Village of Karluk?

"A. Yes, sir.

"Q. Do I understand you to say that the check is a check issued by your company?

"A. It was issued by our company to one of our fishermen to pay for his permit that he had signed an application for.

"Mr. Arnold: We offer the exhibits in evidence."

Mr. Arnold: At this time, if the Court please, we offer Exhibit 9, 9-A, and 9-B in the deposition as exhibits in this case.

Mr. Berrett: No objection.

The Court: They may be admitted.

(Thereupon Plaintiffs' Exhibit 9, 9-A, and 9-B for identification in the deposition was

marked, by the Clerk of the Court, as Plaintiffs' Exhibit H in this cause.) [174]

Mr. Arnold: We agree to stipulate that the exhibits shall be considered as read.

Mr. Berrett: It is so stipulated.

The Court: Very well.

"Q. (By Mr. Arnold): Now, calling your attention again to the exhibits, for what year was the permit issued?

"A. For 1946.

"Q. What is the date of the adoption of the ordinance?

"A. It was approved on the 30th day of May, 1946.

"Q. What is the date of the check?

"A. June 13, 1946.

"Q. And the amount?

"A. Forty dollars.

"Q. And to whom was it drawn?

"A. To Howard Elliott.

"Q. Is he one of your fishermen?

"A. Yes.

"Q. Did he fish for you in 1946?

"A. He did.

"Q. What endorsement does the check carry?

"A. The check was made out to Howard Elliott, and he endorsed it to Alfred E. Naumoff, who is supposed to be the secretary and treasurer of the Native Village of Karluk, Alaska. And he endorsed it to Sears Roebuck Company.

"Q. Will you read into the record Plaintiffs'

Exhibit 9-A, which [175] is the ordinance, and Plaintiffs' Exhibit 9-B, which is the commercial fishing permit, Mr. Gepner?

"A. The ordinance reads as follows:"

Mr. Arnold: I was a little previous, but at this point we stipulate that we waive the reading of this exhibit and turn over past the ordinance to the bottom of page 98.

"Q. Mr. Gepner, did you receive any information about a meeting of the United Fishermen's Union of Kodiak Island or, I should say a meeting of the United Fishermen's Union of Alaska held on Kodiak Island in the spring of 1946?

"A. Yes, I received a copy of their supposed minutes of the regular meeting of the United Fishermen of Alaska, held at the Union Hall, Kodiak, Alaska, May 1, 1946.

"Q. How did those minutes come into your possession?

"A. They were given to my bookkeeper by one of our fishermen.

"Q. Was that fisherman a member of the union?

"A. I do not know whether he was at that time, but he was later a member, I know that.

"Q. Did he attend the meeting?

"A. I cannot say as to that.

"Mr. Arnold: We ask to have this document marked as Plaintiffs' Exhibit 10 for identification.

"(Thereupon the document above referred to was marked Plaintiffs' Exhibit 10 for identification.)

"Mr. Arnold: I will offer it in evidence. [176]

"Mr. Arend: We interpose the usual objections."

Mr. Arnold: At this time, if the Court please, we offer Plaintiffs' Exhibit 10 in the deposition as Plaintiffs' Exhibit I in this case.

Mr. Berrett: If the Court please, we object to the admission of this exhibit in evidence on the ground that no proper foundation has been laid for its introduction. The exhibit itself bears no authentication. There is no reason for supposing that it is a true copy of the minutes of that meeting. It apparently came into the plaintiffs' hands inadvertently through someone who was not even in attendance at the meeting and with no explanation where he got it or whether it was true. Certainly it would have to have something to identify it as the actual minutes taken, some certification, that it is a correct copy. I object to its admission.

Mr. Arnold: If the Court please, I think that objection is waived by failing to press it at the time the deposition was taken. The witness was there when it was offered.

Mr. Berrett: If the Court please, it was agreed that all objections, with the exception as to the form of the question, would be reserved until the time of the trial.

The Court: The objection will be sustained.

"Q. Are you acquainted with Mark Meyer, the warden for the Fish and Wildlife Service on Kodiak Island?

"A. Yes, I am. [177]

"A. Yes, sir, that is ashore. Before and after the fishing season ashore.

"Q. And the company provides the gas and oil on the company boats? A. Yes.

"Q. And are you compensated by this difference in the price that [191] you pay for the fish for the gas and oil?

"A. We are. By the fish caught by the boat. If the boat has a small catch, of course the independent fish are much cheaper than the company fish.

"Q. In case of damage or loss to a company boat, who stands the loss?

"A. The company stands the loss.

"Q. Were any of your boats seized during the 1944-1945 or—during the 1944, 1945, or 1946 season by the Department of the Interior or its agents?

"A. No.

"Q. Do you know of any boat that was seized during those three years by the Department?

"A. None to my knowledge.

"Q. Do you know of any men—fishermen—who were arrested during the three years just mentioned for violating the regulation?

"A. With reference to the Karluk Reservation?

"Q. Yes. A. No.

"Q. This check for forty dollars, does that cover the purchase of one non-resident license to fish in the Karluk area in 1946?

"A. One boat. That covers three men.

"Q. But it covers one boat?

"A. That is right. [192]

"Mr. Arend: No further questions.

"Q. Did you have any conversation or discussion with Mark Meyer during 1946 relative to the Karluk Reservation?

"A. Yes. I talked to Mark regarding the Reservation, and he said that he had instructions to follow out all the—well, to obey the regulations as to the Indian Reservation.

"Q. What did he say, if anything, relative to his intention, or the intention of the Fish and Wildlife Service to enforce the regulations during the 1946 season?

"A. He said that he was going to enforce the regulations down there.

"Q. Did you see or hear of a telegram sent by Mr. Frank Hynes, the defendant in this action, to Mark Meyer, the warden on Kodiak Island of the Fish and Wildlife Service, which has been introduced in evidence here as Plaintiffs' Exhibit 4?

"A. Yes. I saw this wire in Kodiak.

"Q. Who showed it to you?

"A. I do not recall whether it was Mr. Culbertson or Mr. Meyer who showed it to me.

"Q. It was one or the other?

"A. It was one or the other.

"Q. Do you know what the date was that you saw it?

"A. It was between the 24th of May and the 5th of June. I cannot say exactly what date it was, but it was between those two dates.

"Q. How do you fix that time? [178]

"A. Well, I arrived in Kodiak about the 24th of

May, and I left there shortly after the 5th. So it was between those two dates.

"Q. Did you fishermen discuss with you the situation relative to their fishing in the Karluk Reserve in the season of 1946?

"A. Yes, they did.

"Q. What was their attitude?

"A. Well, this is 1946 you are speaking of?

"Q. Yes.

"A. Well, they did not feel like taking out permits to be allowed to fish down there, and they were afraid to fish without them. So they asked me about it, and I told them that the way it looked to me, why the best thing they could do, if they intended to fish there, was to take out permits. And to my knowledge four or five of them did, and the rest of them did not fish there until after the injunction suit.

"Q. Did their failure to fish there until the injunction was served deprive you of any fish?

"A. It did to a certain extent. The fish were not running too heavy at that time, so I cannot say just how many, but I know that it did deprive us of some fish.

"Q. Well, it is your opinion that those fishermen would have refrained from fishing there during the season if the injunction had not been issued?"

Mr. Berrett: If your Honor please, I object to that question as calling for a conclusion of the witness. The [179] testimony heretofore has been that many of these fishermen obtained a permit and, whether an injunction issued or not, they could fish

with their permits, and this calls for an answer for which the foundation has not been laid. It calls purely for a conclusions of the witness.

Mr. Arnold: We feel that it is within the witness' knowledge. He testified as to the circumstances in the discussions he has had with these fishermen.

Mr. Berrett: Does he mean the fishermen who have permits or the fishermen who do not have permits? The question is too general.

The Court: Objection sustained.

Mr. Arnold: Eliminate the answer and start with question 24.

"Q. And after the injunction was issued what was the situation relative to the quantity of fish available in the Karluk area?

"A. Well, practically 90 per cent of our fish came from that area after that, or shortly after that anyway.

"Q. Mr. Gepner, have you examined the records of your company for the purpose of determining the amount of fish caught and the amount of fish—and the amount of cases of salmon packed at your Kodiak Island cannery from the years 1941 through 1946?

"A. Yes.

"Q. And the amount of fish caught and cases packed of fish taken within the Karluk area for those same years? [180]

"A. I have.

"Mr. Arnold: I will have this document marked as Plaintiffs' Exhibit 11 for identification.

"(Thereupon, the document above referred

to was marked Plaintiffs' Exhibit 11 for identification.)

"Q. (By Mr. Arnold): Mr. Gepner, I hand you Plaintiffs' Exhibit 11 for identification and ask you to state what it is.

"A. Well, this is a statement showing the total catch of fish of all types—by all types of gear in all sections, and the amount of cases of salmon those fish produced. And then it shows another statement of the total catch of fish by species in the area included in the Karluk Reservation, and the number of cases those fish produced.

"Q. Now, Mr. Gepner, referring to Plaintiffs' Exhibit 2, previously introduced, being a map of that portion of Kodiak Island in the vicinity of Karluk, can you point out and describe the beach area embraced in the Karluk Indian Reserve?

"A. Well, it is 3,000 feet out from this point (indicating on Plaintiffs' Exhibit 2) which I understand is the north shore of Sturgeon River, here (indicating), up through Wolcott Reef.

"Q. And now, the fish—referring again to Plaintiffs' Exhibit 11, showing the amount of fish taken by your company within the Karluk Reserve, did all of that fish come from within the area contained within the boundaries of the Karluk Indian Reservation as you designated them on the chart?

"A. That is right.

"Mr. Arnold: I will offer Exhibit 11 in evidence.

"Mr. Arend: We will reserve the objections allowed us by stipulation."

Mr. Arnold: At this time, if the Court please, we offer Plaintiffs' Exhibit 11 in this deposition as Plaintiffs' Exhibit I in this case.

Mr. Berrett: No objection.

The Court: It may be admitted.

(Thereupon Plaintiffs' Exhibit 11 for identification in the deposition was marked, by the Clerk of the Court, as Plaintiffs' Exhibit I in this cause.)

Mr. Arnold: We offer to stipulate that the exhibit may be considered as having been read:

Mr. Berrett: Yes, we stipulate.

The Court: Very well, it may be so considered.

"Q. (By Mr. Arnold): What would have been the financial effect upon your operations in 1946 if your fishermen had been prohibited from fishing within the Karluk Reservation during the entire season?

"A. Well, we would have had a very, very small pack, and naturally would have lost considerable money on our operations.

"Q. What would have been the situation in prior years?

"A. On the even cycle it would have been quite serious. On the odd cycle not so much so in our particular case, because we go other places for our salmon. The competition at Karluk is very keen, and we try to get our salmon otherwise if we can [182] but on the even years we always have to go to Karluk for our pack.

"Q. If you were deprived from obtaining your

fish from the Karluk area, or if your fishermen were deprived of the right to fish there, could you obtain an equal quantity of fish from other sources?

"A. I do not think that we could duplicate but a very, very small percentage of our fish from any other source on the island.

"Q. Will you explain the reason for that?

"A. For the simple reason that there are only a few spots to fish there, and they are pretty well taken care of with fishermen, and if you throw in more boats there there is not enough for everybody, so the fishermen would not care to fish when they were only getting a few.

"Q. Referring to your fishermen, have you prepared a list of your fishermen and your boats—

"A. (Interposing): Yes.

"Q. (Continuing): —showing which are company fishermen, which are contract fishermen, and which are independent fishermen?

"A. Yes. Here it is (handing document to Mr. Arnold). We threw in the contract fishermen, as we call them, with the independents there.

"Q. You have listed the contract fishermen with the independents?

"A. Yes, the first two.

"Mr. Arnold: We ask to have this document marked as [193] Plaintiffs' Exhibit 12 for identification.

"(Thereupon, the document above referred to was marked Plaintiffs' Exhibit 12 for identification.)

“Mr. Arnold: We ask that it be received in evidence. Is there any objection?”

“Mr. Arend: No objection.”

Mr. Arnold: If the Court please, we offer Plaintiffs' Exhibit 12 in this deposition as Plaintiffs' Exhibit J in this case.

Mr. Berrett: No objection.

The Court: It may be admitted.

(Thereupon Plaintiffs' Exhibit 12 for identification in the deposition was marked Plaintiffs' Exhibit J in this cause by the Clerk of the Court.)

Mr. Arnold: And we offer to stipulate that the exhibit shall be considered as having been read.

Mr. Berrett: We so stipulate.

The Court: It may be so considered.

The Witness: These, of course, are fishermen only that fish at Karluk.

“Q. (By Mr. Arnold): Referring now to Plaintiffs' Exhibit 12, the exhibit contains a full list of boats, and crews of boats, whether independent or company owned, connected with your company who fished within the Karluk Reserve during the season of 1946?”

“A. That is right. [184]”

“Q. Is that correct?”

A. That is correct.

“Q. How have you divided the company fishermen from the independent fishermen?”

“A. The left side is headed, ‘Company boats.’”

“Q. And now the column of boats and crews listed in the left hand column—on the left hand side

of the exhibit under the heading, 'Company boats,' those being Parks #2, Betty Jeanne, Parks #4, Parks #5, and Parks #7—those boats are owned by the Parks Canning Company?

"A. Yes, sir.

"Q. With the gear, and the seine, and other fishing paraphernalia? A. Everything.

"Q. Everything is owned by the Parks Canning Company? A. That is right.

"Q. Who selects the masters of those boats?

"A. I do.

"Q. What about the other members of the crew?

"A. Well, we ask the master, unless we have men available, to pick his crew.

"Q. Do you or do you not retain the right of approval? A. We absolutely do.

"Q. Do you treat those fishermen as your own employees? A. Yes, we do.

"Q. Do you deduct social security tax and withholding tax from [185] their earnings as fishermen? A. We do.

"Q. Now, the column on the right hand side, headed, 'Independent boats,' consisting of Parks #1, Parks #3, Betty Lou, Lola-C., Peggy L., and Seashell, state who owns those boats.

"A. Well, Parks #1 and Parks #3 are boats which we have sold to Howard Elliott and William Katelnikoff respectively, and the boats are still in the company's name because they have not been paid off yet. As soon as they are paid off they will revert to the two men mentioned.

"Q. What about the other four boats?"

"A. The other four boats are absolutely independent. The boat, the gear and all are owned by the captains of the respective boats.

"Q. Do you have an agreement with all these boats and crews to deliver their catch exclusively to you—to your cannery?"

"A. They are supposed to deliver to us until we tell them not to—that we have enough fish so that we do not want any more. But they are supposed to deliver everything to us. That is the agreement.

"Q. If these independent boats were deprived of the right to fish within the Karluk Reserve, what would be the effect on your operations?"

"A. They would no doubt scatter all over the island where we would not be able to take care of them with tenders or get to them. So we would lose the fish from some of the boats at least. [186]

"Q. In your judgment would they be able to catch an equivalent amount of fish in other places?"

"A. Not ordinarily, no.

"Q. If those independent boats were deprived of the right to fish within the waters of Karluk Reserve, you consider that your company would stand a financial—would sustain a financial loss?"

"A. Well, I know that they would, yes.

"Q. You know that they would?"

"A. Yes, sir.

"Q. Will you read into the record the data that is contained on Plaintiffs' Exhibit 12?"

Mr. Arnold: Just a minute. I believe we stipulated that the exhibit be considered as read, and we offer now to waive the reading of that portion of the deposition if it is agreeable to counsel.

Mr. Berrett: That is agreeable.

The Court: You are offering that in evidence?

Mr. Arnold: It is the exhibit just entered, if your Honor please, and put into the record.

The Court: Very well.

Mr. Arnold: That is all.

Cross Examination

By Mr. Arend:

"Q. Mr. Gepner, who furnished you with a copy of those minutes which [187] are in here as Exhibit 10."

Mr. Arend: Your Honor, any cross-examination on matter excluded from the direct would likewise be excluded?

The Court: Yes, it should be.

Mr. Arnold: If the Court please, this document which your Honor refused to receive is more specifically identified, or partly identified, by these questions on cross-examination. I propose to offer it again.

The Court: We'll go ahead and read it then.

"Q. Mr. Gepner, who furnished you with a copy of those minutes which are in here as Exhibit 10. That is the union meeting.

"A. One of the union fishermen.

"Q. One of the union fishermen?

"A. Yes, sir.

"Q. Do you know which one of the Fish and Wildlife agents made this talk at the union meeting?

"A. I understood it was Mark Meyer.

"Q. Was any official of your company present at the meeting?

"A. No. This was absolutely a union meeting.

"Q. Just for the men?

"A. Yes, sir. No one else was supposed to be there, except, as I understand it, Mark Meyer gave this talk.

"Q. Generally, are you plaintiff fish companies opposed to conservation up there—to the conservation of fish?

"A. No. We are all for conservation. [188]

"Q. As a matter of fact, you are all for it?

"A. Yes, absolutely.

"Q. For the conservation? A. Yes, sir.

"Q. What did you mean by the statement that you regard the fishermen on the company boats as your employees?

"A. For the reason that we hire them—we hire them; pay them wages; and we hire most of them on shore in the spring, and some times in the fall, before and after the fish season, and pay their transportation, and pay their wages, and pay their social security tax—pay social security tax and retain their withholding tax.

"Q. How do you pay those particular fishermen after they leave shore and take to the boats?

"A. By the fish.

"Q. Do you have any men that come up solely to fish on the boats? A. Some, yes.

"Q. And do you regard them as employees?

"A. If they are on a company boat, yes.

"Q. Would you pay the transportation costs of a man who came up from the States only to fish on a boat?

"A. We would. We usually take them up on our boats—our own boats, but if it were necessary, we would.

"Q. You would pay their transportation costs?

"A. Yes. [189]

"Q. How far is your cannery in miles from the Karluk Reservation?

"A. I believe about twenty-five.

"Q. About twenty-five? A. Yes, sir.

"Q. And what is the greatest extent in miles that your men go out from the cannery to fish?

"A. Well, the seine boats—we have fishermen that go out over one hundred miles from the cannery. They are not even seiners, but gill netters, and we pick up the fish from them.

"Q. When did your company first operate in the Karluk area?

"A.—Well, as far as I know the Parks Canning Company started there in 1940, and they fished in the Karluk area then. The cannery was started several years before that, and I do not know where the fish came from then. I would not say.

"Q. Does your company buy fish from the native residents at Karluk?

"A. If they happen to be fishing so that we can buy from them—yes.

"Q. Do you have any of them working for you as fishermen on your boats? A. Yes.

"Q. Are they the old men or the young men?

"A. Some of both.

"Q. Some of both?

"A. Yes, sir. When I made that last statement, you are not holding [190] me to 1946 alone, are you? I am talking concerning the past few years.

"Q. Well, in 1946 is what I intended to inquire about.

"A. There are a few of them on there.

"Q. Of both old and young men?

"A. Well, there is one elderly man there. The others are young.

"Q. Now, in the case of your company, does the union regulate the hours that the men work on your boats, and the kind of living conditions that you are to provide for them on the boats?

"A. No—you mean while they are fishing?

"Q. Yes.

"A. On the fishing boats?

"Q. Yes. A. No.

"Q. As a matter of fact, the only union regulations that you need to observe is the price that you pay to these men who are working on your company boats?

"A. The price on the fish and the wage before and after the fishing season.

"Q. That is, ashore?

“Redirect Examination

“By Mr. Arnold:

“Q. Mr. Gepner, referring to the contract in effect on Kodiak Island between the union and the cannery, is there just one contract—does the same contract govern the relationship between the company fishermen and the company, and the independent fishermen and the company?

“A. It is all included in one contract, yes, sir.

“Q. Are there any provisions in there requiring the company to furnish services to independent fishermen, such as salt, and the delivery of groceries, and stipulations as to tender service?

“A. Yes. That applies of course both to company fishermen and independent fishermen.

“Q. Will you explain what those conditions are?

“A. Well, for instance we have to furnish free salt to the boats. They use that on their nets, especially over the closed period at the end of the week—the weekly closed period—to preserve their nets. And that is furnished to both company and independent fishermen. And we have to give tender service—daily tender service to both company and independent boats, or we will be penalized.

“And what is the third question?

“Q. How about the delivery of supplies to independent boats?

“A. We are supposed to deliver them supplies. They send in an order, [193] and we are supposed to have the order back filled within a reasonable time.

“Q. Reverting again to the question of tender service, would you explain rather fully what tender service is, and what the contract requires of the company in the way of tender service, and what the penalty is for failure to supply it to independent fishermen?

“A. Well, tender service—we will take, for example, at Karluk, it is necessary for us to have a tender there at least once a day, and when there is a big run of fish we try to have one there all the time. And if we do not have a tender there the fishermen—well, if we do not have a tender there the fishermen get rid of their fish to someone else or in whatever other way they can. So the result is that those fish are lost to us. And if the fishermen have to wait a certain length of time—I do not recall what our penalty is but it is quite high—we must furnish them with a certain number of fish, if they have to wait over six hours, or something of that kind.

“Q. Will you explain what a tender is, and what it does with respect to these independent fishermen?

“A. Well, the tender is a boat that is built for carrying fish. In most cases the boats up there will carry anywhere from thirty thousand to some as high as sixty thousand fish, and possibly more than that. And the fishermen deliver their fish to the boat, and the boat in turn brings them to the cannery and unloads them there. Of course, it carries supplies, like in some cases the fishermen have no water and the boat takes water to them,

and it has tanks for gas to take to them, and they—and the tenders take coal, and they take provisions and salt, and some times when a fishing boat breaks down they tow the fishing boat home to be repaired. They are just a service boat.

“Q. And in that tender service is there any distinction in the practice or in the contract between the tender service rendered to the company fishermen on the one hand and the independent fishermen on the other?

“A. No. We give both the same service in our practice.

“Q. Does your company own, maintain, and operate tenders for that purpose?

“A. We either own or charter tenders for that purpose.

“Q. You testified here previously as to the investment your company had in floating equipment. Was the investment in these tenders one of the items that went to make up the investment in floating equipment? A. It was.

“Q. Can you state approximately the number of tenders that your company owns, and their names, and their value, which you use and operate on Kodiak Island for the purpose of taking care of your company and independent fishermen? [195]

“A. You are speaking of the present season—the 1946 season you are speaking of, is that right?

“Q. Yes.

“A. We own one tender, the General Pershing, valued at, I would say, about forty thousand dollars. The other tenders were chartered.

"Q. What were the other tenders? What were their names?

"A. The Frances; the Northland, and the Aleutian.

"Q. Can you state approximately the charter price that you paid for those tenders during the season of 1946?

"A. We paid for the three together around twenty-six thousand dollars.

"Mr. Arnold: That is all, Mr. Gepner.

"Recross Examination

"By Mr. Arend:

"Q. Were the men who worked on the tender Frances paid a wage or a price per fish carried?

"A. Wage—a wage.

"Q. A regular wage?

"A. Yes. They are governed by the union also—by a different union.

"Mr. Arend: That is all.

"Redirect Examination

"By Mr. Arnold:

"Q. In order to avoid any misunderstanding and so that the record [196] will be clear, what was the situation with reference to the crews on the three chartered tenders?

"A. They got the same wage.

"Q. This charter price that you mentioned of twenty-six thousand dollars, was that bare boat?

"A. That was bare boat, yes.

"Q. And you paid wages in addition to that charter then—did you pay the master and the

engineer and the members of the crew on those vessels their wages, in addition to this charter price?

“A. We paid every one on the boat—the entire crew.

“Q. And that was in addition to the twenty-six thousand dollars paid for the bare boat charter?

“A. Yes. And we paid for fuel, provisions—well, for everything else. We just got the boat, that was all, for that charter money.

Q. Did those vessels receive fish from your company and independant fishermen within the area of the Karluk Reserve? A. They did.

“Q. Those vessels would have been subject to seizure for violation of that regulation, would they not? A. The tenders?

“Q. Yes.

“Mr. Arend: I object to that as calling for a conclusion.

“Mr. Arnold: I will withdraw the question. That is all.”

Mr. Berrett: Just a moment, please. That particular [197] question was objected to by Mr. Arend at the time of the taking of the deposition and was withdrawn by Mr. Arnold, is that true?

Mr. Arnold: Yes, I think that is proper. We consider it as withdrawn now.

“Mr. Arend: That is all.

“(Witness excused), [198]

"GEORGE W. KING,

"called as a witness on behalf of the Plaintiffs, having been first duly sworn, was examined and testified as follows:

"Direct Examination

"By Mr. Arnold:

"Q. State your name and address.

"A. George W. King, 2424 East Lynn Street, Seattle.

"Q. What is your occupation?

"A. Cannery Superintendent at Uganik Bay.

"Q. By what company are you employed?

"A. I am employed by the San Juan Fishing and Packing Company, and by the Uganik Fisheries.

"Q. By both companies?

"A. Yes. There are two plants right near each other.

"Q. How long have you held the position of Superintendent at the cannery of the San Juan Fishing and Packing Company?

"A. Right at that place for four years.

"Q. How long have you worked for the San Juan Fishing and Packing Company?

"A. For 24 years.

"Q. How long has the San Juan Fishing and Packing Company been engaged in the business of canning salmon in the Territory of Alaska?

"A. 20 years.

"Q. How long on Kodiak Island? [199]

"A. 20 years.

"Q. How long has the Uganik Fisheries been

engaged in the business of canning salmon in the Territory of Alaska? A. For 24 years.

“Q. How long on Kodiak Island?

“A. 24 years.

“Q. You are superintendent of these two plants, is that correct? A. Yes.

“Q. Where are they located?

“A. On Uganik Bay on Kodiak Island.

“Q. About how far apart?

“A. About a mile apart.

“Q. How long has the Uganik plant of the San Juan Fishing and Packing Company been in operation? A. Since 1926.

“Q. Has it operated during all years in that time?

“A. There was one year, 1932, that they did not operate.

“Q. How long has the plant of the Uganik Fisheries at Uganik Bay been in operation?

“A. It has operated since 1922 every year, I believe.

“Q. Every year? A. Yes.

“Q. If you know, during how many of those years did either of those plants obtain fish from within the area now included in the Karluk Indian Reservation? [200]

“A. Well, I believe they have been fishing there ever since purse seining opened there—maybe a year or two after. I believe since about 1936.

“Q. What is the approximate value of the plant and shore facilities of the San Juan Fishing and Packing Company at Uganik Bay?

“A. \$220,000.

"Q. What is the approximate value of the plant and shore facilities of the Uganik Cannery?

"A. \$128,000.

"Q. What is the approximate investment in tenders, fishing gear and other equipment used in the taking of fish at these two plants?

"A. The San Juan fishing gear and tenders, and so forth, \$109,000. Uganik Fisheries, \$137,000.

"Q. What was the approximate amount of money expended at the two plants for pre-season preparation for the 1946 fishing season?

"A. At the San Juan plant, \$208,000; at the Uganik Fisheries plant, \$167,000.

"Q. State, if you know, the number of employees, not including fishermen, transported to each of these two plants from points outside of Alaska in preparation for the 1946 fishing season.

"A. For the San Juan, it would be 104; for Uganik Fisheries, 22.

"Q. State with relation to the same thing, as to fishermen.

"A. The San Juan, 45; Uganik Fisheries, 15.

"Q. Is that the total number, or is that the number transported from outside of the territory?

"A. That is the total number. The ones transported from outside other than other areas in Alaska, are San Juan, 4; Uganik Fisheries, 2.

"Q. State whether during the years prior to 1946, but not including 1946, your company's operations on Kodiak Island were interfered with in any manner by the Karluk natives, or by the Office of Indian Affairs."

Mr. Berrett: If the Court please, we object to that question as being incompetent, irrelevant, and immaterial on the ground that it deals with matters over which the defendant had no control.

The Court: Objection overruled.

"A. Well, in 1944, when the reservation was voted on and set up, why the buoys were placed out there and the fishermen told to stay outside of the buoys. And the same thing in 1945. And at that time, in 1945, any of the boats that were inside buoys they took their numbers and pictures of the boats.

"Q. And were the fishermen instructed by the natives of Karluk or by the agents of the Office of Indian Affairs to stay outside of the markers?

"A. Yes, they were."

Mr. Berrett: Your Honor, we object to that question on the same grounds. [202]

The Court: Well, I think it doesn't show that they knew that they were so instructed. I will sustain that objection.

"Q. Were they threatened with prosecution or seizure of their vessels if they went inside of the markers?"

Mr. Berrett: Your Honor, I object to that question on the same grounds.

The Court: All right. Objection sustained.

"Q. Did you have any conversation with any agents of the Office of Indian Affairs or of the village of Karluk in the year 1945?

"A. Yes——"

Mr. Berrett: Just a minute, we object to that question as dealing with matters concerning others than the defendant.

The Court: Objection overruled.

"A. Yes. Mr. Mueller went through our cannery there on his way to Karluk in the spring, and told us that they were going to enforce all measures.

"Q. Did he say how they were going to enforce these measures or what penalties would be applied?"

Mr. Berrett: Just a moment. Your Honor, I object to that question on the same grounds. It is incompetent, irrelevant, and immaterial.

The Court: Objection overruled.

"A. No, I didn't hear that. He didn't say that to me.

"Q. Do you know whether or not he or they established a patrol in 1945 in that area?" [203]

Mr. Berrett: Your Honor, I object to that question on the same grounds.

The Court: Objection overruled.

"A. I understand that they did. They had a boat out there, and they had men on the beach.

"Q. Coming now to the year 1946, were there any efforts made by the natives of Karluk, or the Office of Indian Affairs, or the officials of the Fish and Wildlife Service, to interfere with your operations of fishing within the Karluk Reserve?

"A. In the Fish and Wildlife Service's regulations for 1946, it stated that no one could fish within the reservation area except a resident of the Vil-

lage of Karluk, or a person who had been issued a permit by the Village. I understood that Mr. Meyer stated—I didn't talk to him, but I heard from various sources, through fishermen and different ones in town at Kodiak—that this measure was to be enforced.

“Q. Did your fishermen discuss this matter with you? A. Yes, sir.

“Q. In the spring of 1946? A. Yes.

“Q. Did they appear to be afraid to fish within the Karluk Reserve?

“A. They did not particularly like the idea of buying the permits, but they thought—some of them seemed to think that unless they did buy them they might get in trouble—most of them were of that opinion—and some of them did buy permits. [204]

“Q. Those that did not buy permits, what did they do?

“A. Well, I don't know. I am of the opinion that most of them bought permits.

“Q. You have no checks as to how many bought permits? A. No, I have not.

“Q. Do you know what price they were required to pay for the permits, if they did buy them?

“A. I understood that it was \$40 per boat for non-resident fishermen of Alaska, and \$2 per boat for residents of Alaska.

“Q. Going back to your fishermen, you stated that the San Juan had a total of 45 fishermen and Uganik a total of 15? A. Yes.

“Q. Did some of those fishermen fish on company boats? A. Yes.

"Q. Could you state how many?

"A. The San Juan fished last year six of their boats, and the Uganik Fisheries three.

"Q. Do you know how many men those crews would consist of on the company boats?

"A. Most of them were three-men crews.

"Q. Did you receive fish from any contract boats or from boats that you sold on conditional sale? A. Yes, sir.

"Q. Or that you financed?

"A. Yes. The San Juan has three boats that they are selling on [205] contract, and the Uganik Fisheries has one.

"Q. Did you receive any fish from independently owned boats?

"A. Yes. We had four boats strictly independent that were fishing for us.

"Mr. Arnold: I ask to have this document marked as Plaintiffs' Exhibit 13, consisting of two sheets.

"(Thereupon the document above referred to was marked Plaintiffs' Exhibit 13 for identification.)

"Q. (By Mr. Arnold) Mr. King, have you examined the records of the San Juan Fishing and Packing Company to determine the catch and pack by species at the San Juan plant on Kodiak Island for the years 1941 and 1946 inclusive?

"A. Yes, sir.

"Q. And the proportion of that catch and pack which came from within the Karluk Reserve?

"A. I have.

"Q. I will hand you Plaintiffs' Exhibit 13 for identification, and ask you to state what that document is.

"Q. That is a record of the total catch of fish for the years 1941 to 1946, inclusive, from the entire area of Kodiak Island; also a record of the total pack of our cannery for those years from 1941 to 1946, inclusive.

"Also the total catch in the Karluk Reservation area for those same years. And also the pack of fish derived from that catch of fish in those same years from 1941 to 1946, inclusive. [206]

"Q. Was that exhibit prepared under your direction? A. Yes, it was.

"Q. What was the source of that information contained therein? A. From our books.

"Q. And this covers the operations of the San Juan Fishing and Packing Company only?

"A. There were several years that we were in consolidation with the Alaska Packers' Association and, of course, in 1946 in consolidation with the Uganik Fisheries. The pack figures include all that.

"Mr. Arnold: We would ask to have the exhibit received in evidence."

Mr. Arnold: If the Court please, at this time we offer Plaintiffs' Exhibit 13 in the deposition as Plaintiffs' Exhibit K in this case.

Mr. Berrett: We have no objection.

The Court: It may be admitted.

(Plaintiffs' Exhibit 13 for identification in

the deposition was marked, by the clerk of the court, as Plaintiffs' Exhibit K in this cause.)

Mr. Arnold: We agree to stipulate that the exhibit shall be considered as read.

Mr. Berrett: That is agreeable.

The Court: Very well, it may be so considered.

“Mr. Arnold: I ask to have this document marked as Plaintiffs' Exhibit 14 for identification, consisting of two sheets. [207].

“(Thereupon the document above referred to was marked Plaintiffs' Exhibit 14 for identification.)

“Q. (By Mr. Arnold) I will ask you, Mr. King, if you have examined the records of the Ugarnik Fisheries to determine the pack—the catch and pack by species in the years of 1941 to 1946, inclusive, and the proportion of that pack and catch which came from within the Karluk Reserve?

“A. I have.

“Q. I hand you Plaintiffs' Exhibit 14 for identification, and I will ask you what the document consists of.

“A. It consists of the record of the catch of fish with reference to the Ugarnik Fisheries from the years 1941 to 1945, inclusive. The 1946 catch, of course, is consolidated with the San Juan catch.

“It also consists of the total pack for the years 1941 to 1945, inclusive. That is, the Karluk catch—the catch of fish in the Reservation area and the fish pack derived from that catch for the years 1941

to 1945 inclusive. The 1946 figures are, of course, included in the San Juan statement.

"Mr. Arnold: I ask to have this exhibit, Plaintiffs' Exhibit 14 for identification, received in evidence."

Mr. Arnold: At this time, if the Court please, we offer Plaintiff's Exhibit 14 in this deposition as Plaintiffs' Exhibit L in this case.

Mr. Berrett: No objections. [208]

The Court: It may be so admitted.

Mr. Arnold: I offer to stipulate that the exhibit shall be considered as having been read.

Mr. Berrett: We so stipulate.

The Court: Very well.

(Thereupon Plaintiffs' Exhibit 14 for identification in the deposition was marked, by the clerk of the court, as Plaintiffs' Exhibit L in this cause.)

"Q. (By Mr. Arnold) Mr. King, if your boats—that is, the company boats, contract boats and independent boats were deprived of the right to fish within the Karluk Reserve, would it result in curtailment of production at your plants?

"A. It would.

"Q. Could that supply of fish be made up from other sources? A. No, it could not.

"Q. What would be the financial result if you were deprived of that source of supply?

"A. It would cut down our pack materially on most years—especially on the even numbered years. And, of course, necessitate, maybe, the slowing up

of our operations. That is, we would have to make our operation smaller, and we would be losing that source of fish.

“Q. Is the question of the time that a fish supply is available—the time of the season—a factor in production costs?

“A. It is. It is a big factor. For instance, the fish that are caught in the Karluk Reserve area come at times when there [209] aren't a great deal of fish anywhere else on the Island. So it gives the fishermen and the canneries a chance to get those fish, and then when that slackens off, there are other areas that may come in heavier and we can have a more even, constant run, rather than a peak run and then nothing at all. It smooths the whole thing out and gives everybody a better chance. And the longer you can run to a fair capacity, why the bigger pack you are going to get up.

“Q. Speaking of red salmon production during the time that red salmon are being caught in quantity at Karluk within the Karluk Reserve, are there other adequate sources of red salmon at those times under normal conditions?

“A. Not exactly at the times that the fish are good at Karluk. At Karluk is generally the first red salmon area of any great extent. Red salmon come in there first. Of course, there are other areas where red salmon are produced, for instance, Red River, but they come in later there. Those two areas are the only two red salmon areas in the whole entire length or district where you can catch any reds. And if one of them is closed to commer-

cial fishing or purse seiners, it would mean a concentration of boats in the other areas where the fishermen would not do as good, and it might deplete the supply of fish for them.

"Q. With reference to the fishermen on your company boats, Mr. King, do you deduct social security tax and withholding tax [210] from their earnings? A. We do.

"Q. You do? A. Yes.

"Q. Do you in any case pay their transportation to and from the continental United States?

"A. We take very few fishermen from the States. There is one crew that we take up, and they help work the boat up, and they hang gear when they get there, and of course they are on a wage at that time. And they go fishing when the fishing season starts.

"Q. Do you know, Mr. King, whether your companies carry employer's liability insurance and workman's compensation insurance on your companies' fishermen?

"A. I am not sure on that.

"Q. You heard Mr. Gepner testify here about the tender service and the union contract, and the conditions under which both companies and independent fishermen operate for his company, did you? A. Yes.

"Q. Do your companies render the same tender service and the same facilities to all classes of fishermen?

"A. Yes. We make no discrimination whatever

as to whether they are independent or company fishermen.

"Q. If your independent fishermen were deprived of the right to fish within the Karluk Reserve, would that result in a [211] financial loss to you?

"A. Yes. We would lose just that much fish to can.

"Mr. Arnold: That is all.

"Cross Examination

"By Mr. Arend:

"Q. Mr. King, how many miles distant from the Karluk Reservation is the San Juan Cannery?

"A. Between 50 and 55 miles.

"Q. And it would be about the same for the Uganik Fisheries?

"A. Yes, because they are just about a mile apart, those two canneries.

"Q. Have you yourself—how long have you, yourself, personally been operating around Kodiak?

"A. I have spent five seasons there. I have been there the past four years, and then I was there in 1933.

"Q. Have you ever been at the Karluk Village?

"A. Yes.

"Q. Is fishing the chief form of livelihood of the Karluk Indian residents?

"A. I presume it is.

"Q. Do you know if there is much trapping back in the hills?

"A. There is some trapping, I guess. I haven't much familiarity with that, but I presume there is.

"Q. Going back to these two canneries, how far out does the operation of the San Juan Company extend? [212]

"A. Oh, possibly 100 or 125 miles in various directions.

"Q. Now, would the same apply to the Uganik Fisheries Cannery? A. Yes.

"Q. Now, who chose the captains for the company owned boats—the company or the fishermen that operate the boats?

"A. The company does.

"Q. The company does?

"A. We select the captains to operate the company boats.

"Q. Do you direct them where to fish?

"A. As much as we can.

"Q. That is in accordance with a sort of gentlemen's agreement?

"A. Most of them are pretty cooperative. They generally go where the fish are, and, of course, we send the tenders to where the most of the boats are.

"Q. Do you regard the men fishing on the company owned boats as employees of the company?

"A. Well, that is something that I do not know whether I am sure on or not. I know that we do pay their social security and withholding tax.

"Q. Do you pay their transportation up from the States?

"A. What few we take up, we generally take

them up on the tender, and they perform work up there—pre-season work on the gear.

“Q. You do not have many that go up there just to fish for your from the States?

“A. No. They perform some pre-season work.

“Q. And they are paid a wage for their pre-season work? A. Yes, sir.

“Q. And after season work?

“A. Yes. They generally come south right after the season is over.

“Q. How do you pay them for their work on the fishing boats? A. It is all per fish.

“Q. It is all per fish? A. Yes.

“Q. And the captains are paid in the same way?

“A. Yes.

“Q. Do you have any monetary investments at Karluk, or in the vicinity of Karluk, other than in your floating equipment?

“A. No, we have not.

“Q. Have you supplied us with a list of your boats that fished up there in 1946?

“A. I didn't know that you wanted such a list, and I was not able to get back to the office during the intermission, but I can give you the names of the boats and the names of the masters, and I can give that to you right now. But I have not the crew members.

“Q. That will be all right if you will just give us those.

“A. Referring to the San Juan Company's

boats, they are S J No. 2, and the captain of the

S J No. 2 is Victor Norton;

"S J No. 4, Andrew Peterson;

"S J No. 5, Mose Malutin; [214]

"S J No. 6, Scotty Riddell;

"S J No. 7, Arthur Sunde;

"S J No. 8, William Titus.

"And then with reference to the independent boats, that is, the boats that we are selling on contract, there are three of them, and they are:

"Tippy, Thomas Clampfer;

"Skippy, A. J. Cichoski;

"Marmot, Thomas Von Scheele.

"Those three are contract boats, as we call them.

"Then the next four are strictly independent boats, and they are:

"Midnight Sun, of which Paul Brooks is the skipper;

"Beta B, of which Lyle Boyd is the skipper;

"Esther, of which Robert King is the master;

"Hazel M, of which Walter Sargeant is the skipper;

"The Uganik Fisheries Company boats are:

"U F No. 2, Edward Larson, captain;

"U F No. 3, Ted Sheratin, captain;

"U F No. 4, Edwin Liljegren, captain;

"and then there is one boat that we are selling on contract, the Caroline, of which Ray Harmon is the master.

"Q. Those four independent boats that you

named for Mr. Arnold here are all owned by the Uganik Fisheries, is that right?

"A. The four independents? [215]

"Q. I mean by the San Juan Company.

"A. No. They are strictly independent. We have no interest in them whatsoever.

"Q. But they work for the San Juan Company, do they?

"A. They work for the San Juan Company, yes.

"Q. That is what I mean. Do you employ any natives on any of these boats?

"A. A number of them.

"Q. Fishermen?

"A. Yes. Quite a few of them are natives.

"Q. On your contract boats?

"A. Yes, on the contract boats some of the crews are natives.

"Q. And do you buy fish from the seine fishermen on the shore—that is, the native fishermen on the shore? A. Beach seiners?

"Q. Yes, the beach seiners.

"A. Well, we haven't in the last year or so, but during the years when we were in consolidation with the Alaska Packers, we packed the fish that were caught by the beach seiners for the Alaska packers.

"Q. Isn't it a fact that the beach seiners sell most of their fish to the Alaska packers?

"A. That is right.

"Q. In your case would the union contract be the same as testified to here by Mr. Gepner? [216]

"A. Yes, we all deal with the same union.

"Q. Were any of the boats of these two companies with whom you are connected seized by the Department of the Interior or any of its agents during 1944, 1945, or 1946? A. No.

"Q. Were any of the fishermen who fish for your company arrested during those years by the Department of the Interior?

"A. You mean in the Karluk Reservation area?

"Q. Yes, in the Karluk Reservation area.

"A. No.

"Q. Do you know of any attempts to arrest fishermen there—actual attempts?

"A. None that I ever heard of.

"Q. Or did you know of any actual attempt to seize fishing boats or gear in the Karluk reservation area during the past three years?

"A. Not to my knowledge.

"Mr. Arend: That is all.

"Redirect Examination

"By Mr. Arnold:

"Q. Mr. King, Mr. Arend asked you if you had natives fishing for you. As a matter of fact, most of the crews of the boats that fish for you are natives of Kodiak Island, are they not?

"A. The biggest percentage of them are, yes.

"Q. When I say 'natives' I mean they are of native blood. [217] A. Yes.

"Q. Non-whites. A. That is right.

"Q. There are many other native Alaska fishermen on Kodiak Island besides the native inhabi-

tants of the Karluk Indian Reservation, are there not? A. Yes, sir.

"Q. Mr. Arend asked you if it were not a fact that the principal means of livelihood of the Karluk native Indians was fishing. Would that not be true of all the natives on Kodiak Island?

"A. I think, it is true of all the natives on Kodiak Island—I am sure it is.

"Q. I note that you listed as one of your masters Von Scheele—one of the Von Scheele's.

"A. Yes.

"Q. Is it, or isn't it a fact that Von Scheele is a native of Alaska, Indian blood, born and raised at the village of Afognak? A. That is right.

"Q. Is the village of Afognak located within the boundaries of the Karluk Indian Reservation?

"A. No.

"Q. Is Von Scheele an inhabitant now of the area within the Karluk Indian Reserve?

"A. No.

"Q. He and other native inhabitants of the village of Afognak would [218] be prohibited from fishing in these Karluk waters by the 1946 regulation, would they not? A. They would be.

"Q. I note one of your masters is named Robert King. State whether or not it is a fact that Robert King is of native blood and resides in the town of Kodiak, and is a son of the resident priest of the Russian Catholic Church?

"A. That is my understanding.

"Q. Does he reside within the area of the Karluk Indian Reservation? A. No.

"Q. Under the 1946 regulation would Robert King have been prohibited from fishing within the Karluk Indian Reserve except by permission of the Karluk natives? A. He would be.

"Q. Going back to the village of Afognak, are you familiar with the village of Afognak?

"A. Yes, I have been there.

"Q. Where is it located with reference to your cannery?

"A. It is north and east of our cannery, on Afognak Island.

"Q. About how far?

"A. Oh, I would say about 45 miles, possibly.

"Q. Do you have other fishermen on your boats who are residents of the village of Afognak?

"A. We do. [219]

"Q. What is the principal means of livelihood of the native inhabitants of the village of Afognak?

"A. Fishing.

"Q. I understood you to say that during the years that your operations were consolidated with the Alaska Packers, that you canned the fish taken by the beach seines at Karluk? A. We did.

"Q. When you say 'the Alaska Packers', whom do you refer to?

"A. The Alaska Packers Association that have an office here and the cannery at Larson Bay, Alaska.

"Q. It is a canning concern engaged in the business of canning salmon on Karluk Island?

"A. That is right.

"Q. As a matter of fact, whom did you buy those fish from in the years that you canned them—the beach seined fish from Karluk?

"A. Well, actually from the Alaska Packers. I think these natives operate as company fishermen for the Alaska Packers.

"Q. You are familiar, or are you familiar with the method of operation of the beach seines at Karluk Spit?

"A. Yes. I have been there a number of times, and have seen them operate.

"Q. During the years that the Alaska Packers' operations were consolidated with yours, did you have a direct interest in the operation of those beach seines? [220] A. We did.

"Q. Whom did those beach seines belong to?

"A. The Alaska Packers.

"Q. And the shore facilities at Karluk, the warehouse, the mess house and the bunkhouse, the gear shed, the web loft, and the other facilities used in conjunction with the operation of the beach seines at Karluk Spit, to whom did they belong?

"A. To the Alaska Packers.

"Q. Who had charge of the making up of the gear in preparation for the operation of those beach seines at Karluk Spit?

"A. The Alaska Packers' web boss, and, of course, he supervised the natives working under him.

"Q. Do you know whether the inhabitants of the village of Karluk, who worked on those beach seines, at Karluk Spit—do you know whether those

inhabitants who work on those seines are independent fishermen or company fishermen fishing for the Alaska Packers Association?

"A. They are company fishermen fishing for the Alaska Packers.

"Q. Do you know whether or not Karluk natives are employed at a wage fixed by the hour or day in pre-season work at Karluk Spit in preparation for the operation of those beach seines?

"A. Yes, they are. Both in pre-season and after-season work they are employed, both at Karluk and at Larson Bay.

"Q. Do you know whether or not the Alaska Packers' Association maintains facilities on Karluk Spit for furnishing lodging [221] and subsistence to the Karluk natives, both during the pre-season work and during the actual fishing season when those seines are in operation?

"A. They operate a mess out there on the spit—in fact, they operate two mess houses, and I believe the natives pay for their board and room, or for board, although I am not sure. I know that one year they hired cooks from the outside—from the states—and the natives paid the cooks.

"Q. In the years that you received and canned that fish at your plant, did you have any business dealings with the natives at Karluk? Did you pay them for the fish? A. No, we did not.

"Q. With whom did you make the agreement to receive and can that fish?

"A. With the Alaska Packers' Association.

"Mr. Arnold: That is all.

"Recross Examination

"By Mr. Arend:

"Q. Mr. King, can you state of your own knowledge whether or not Captain Von Scheele and Robert King took out a license this year, for 1946, to fish in the Karluk Reservation?

A. I don't know.

"Q. You don't know? **A.** No.

"Q. From your answers to Mr. Arnold respecting the relationship [222] between the Karluk beach seiners and the Alaska Packers, I gather that the beach seiners and Karluk residents are employees of the Alaska Packers, is that right?

"A. I think so, yes. Of course, they are definitely employees before and after the fishing season, and during the season. I think that they fish about on the same basis as do our company fishermen—on the same basis.

"Q. You think that they are paid by the piece—that is, by the fish?

"A. They are paid by the fish during the fishing season:

"Mr. Arend: That is all.

"Mr. Arnold: Are they paid at the company price or at the independent price?

"The Witness: They are paid on the basis of the company price.

"Mr. Arnold: That is all.

"(Witness excused.)" [223]

"GUY GRAHAM,

"called as a witness on behalf of the Defendant, having been first duly sworn, was examined and testified as follows:

"Direct Examination

"By Mr. Arnold:

"Q. Will you state your name?

"A. Guy Graham.

"Q. And where do you reside, Mr. Graham?

"A. 4207 - East 37th Street, Seattle.

"Q. What is your occupation?

"A. I am manager of the Libby, McNeill & Libby Salmon Department.

"Q. How long have you occupied that position?

"A. Five years.

"Q. How long have you been employed by Libby, McNeill & Libby?

"A. Thirty-four years.

"Q. Libby, McNeill & Libby is one of the plaintiffs in this action? **A.** Yes.

"Q. And they are engaged in the business of canning salmon in the Territory of Alaska, are they? **A.** They are.

"Q. How long have they been so engaged?

"A. Thirty-four years.

"Q. Do Libby, McNeill & Libby operate a salmon cannery at Kodiak Island? [224]

"A. They do.

"Q. How long have they operated that plant?

"A. One year.

"Q. Where is the plant located?

"A. On Moser Bay.

"Q. Did Libby, McNeill & Libby construct the plant, or did they acquire it by purchase?

"A. They acquired it by purchase.

"Q. From whom did they purchase it?

"A. From the Far North Packing Company.

"Q. State, if you know, when the Moser Bay plant was built. A. In 1939.

"Q. In 1939? A. Yes, sir.

"Q. State, if you know, whether it has operated during all the years from the date of its construction until 1946.

"A. It has operated during all the years, with the exception of 1943, when it was in consolidation with other canneries.

"Q. What is the approximate value of the plant and its shore facilities?

"A. The plant and shore facilities are valued at \$150,000.

"Q. What is the approximate investment in tenders, fishing gear and other equipment used in connection with the Moser Bay plant of Libby, McNeill & Libby on Kodiak Island?

"A. Approximately \$100,000. [225]

"Q. What was the approximate sum of money expended by Libby, McNeill & Libby for pre-season preparations to operate the Moser Bay plant?

"A. Approximately \$140,000.

"Q. State the number of employees, as distinguished from fishermen transported to the cannery from points not on Kodiak Island, in preparation for the 1946 season?

"A. 94, including tender men.

"Q. State the number of fishermen transported

to the cannery from points not on Kodiak Island in preparation for the 1946 season.

"A. Do you want included in that the gill netters?

"Q. Yes; all fishermen. A. 461.

"Q. State the total number of fishermen who fished for the cannery during the season of 1946.

"A. The total was 78.

"Q. Will you break that figure down as to gill netters, seiners, company and independents?

"A. There were 12 independent gill netters; 16 company gill netter; 40 independent seiners; and 10 company seiners, or a total of 78.

"Q. Speaking now of the seiners—of the independent seiners—did the company finance any of the independent boats?

"A. Yes. We financed five. [226]

"Q. Do you hold title to those five boats, or are they sold on conditional sales contract?

"A. We hold title to them.

"Q. You hold title to them? A. Yes, sir.

"Q. How many company boats do you have, if you know? A. We have five company boats.

"Q. And how many independent boats other than the five company boats?

"A. Five independent boats.

"Q. You have five in each category?

"A. That is right.

"Q. Or a total of 15? A. Yes.

Q. State whether prior to, or during the season of 1946, that being the first year of your operation on Kodiak Island, whether your operations were interfered with in any way by the Karluk natives,

the Office of Indian Affairs, or by the Fish and Wildlife Service, seeking to enforce the 1946 regulation prohibiting fishing within the Karluk Indian area by people other than natives of Karluk or persons authorized by them.

"A. As stated previously by me, we did not operate prior to 1946, so I have no first hand knowledge of those years. We did receive interference in 1946, as brought about by the threat of the telegram sent by Frank Hynes, of the Fish and Wildlife [227] Service, that the area was restricted and our people would be prohibited from fishing or using it.

"Q. Do you refer know to the telegram of May 25 sent by the defendant, Frank Hynes, to Mark Meyer, the warden on Kodiak Island, the substance of which is contained in Plaintiffs' Exhibit 4? Is that the telegram that you refer to?

"A. Yes, it is.

"Q. Did you personally have knowledge of that telegram. A. I did.

"Q. When and where did you acquire that knowledge?

"A. The telegram was shown to me and read to me on the 28th of May in the Alaska Salmon Industry's offices here in Seattle.

"Q. Referring now to Plaintiffs' Exhibit 4; what is the Alaska Salmon Industry, Incorporated?

"A. The Alaska Salmon Industry, Incorporated, is an organization set up by members of the canned salmon packers for the handling of various subjects of their business, including negotiations for labor, transportation, and so forth.

"Q. Is your company a member of that organization? A. It is.

"Q. Who are the officials of the organization, or what position do you hold, if any, with the Alaska Salmon Industry, Incorporated?

"A. I am president.

"Q. Who are the other officials of the company?

"A. W. C. Arnold is managing director; Walter Fuhrer is manager, and Steele Culbertson is assistant manager.

"Q. Referring now to Plaintiffs' Exhibit No. 4, being a telegram addressed to the Alaska Salmon Industry, Incorporated, what signature appears on the telegram?

"A. That of Culbertson.

"Q. Is that Steele Culbertson, the assistant manager of the Alaska Salmon Industry, Incorporated, that you have now just referred to?

"A. I understand that to be so.

"Q. Do you know of your own knowledge whether Mr. Steele Culbertson, the assistant manager of the Alaska Salmon Industry, Incorporated, was in Kodiak on business for the Alaska Salmon Industry, Incorporated, at the time that that wire was dispatched and received? A. He was.

"Q. Are the other plaintiff companies in this suit members of the Alaska Salmon Industry, Incorporated, or if there are any exceptions, will you state them? A. They are.

"Q. All of them?

"A. There is one exception, the Parks Canning Company.

"Q. The Parks Canning Company is not a member of the Alaska Salmon Industry, Incorporated?

"A. That is right. [229]

"Q. All the other plaintiff companies are members of the Alaska Salmon Industry, Incorporated?

"A. Yes, they are.

"Q. Mr. Graham, if your company and independent boats had been prohibited from fishing in the Karluk Reservation during the season of 1946, would it have substantially affected your operations?

"A. It would have.

"Q. Would it have resulted in financial loss to your company's operations on Kodiak Island?

"A. It would.

"Q. Have you had the records of your company examined, and also the records of your predecessor company, to determine the amount of fish caught and the amount of cases packed at the Moser Bay plant on Kodiak Island from the years 1941 to 1946, inclusive, and the amount of fish caught and cases packed from those fish taken from within the areas covered by the Karluk Indian Reservation?

"Mr. Arnold: I ask to have this marked as Plaintiffs' Exhibit 15 for identification, consisting of two sheets.

"(Thereupon the document above referred to was marked Plaintiffs' Exhibit 15 for identification.)

"Q. (By Mr. Arnold): I hand you Plaintiffs' Exhibit 15 for identification, and I will ask you to state what the document is.

"A. This is a document drawn up by Libby, McNeill & Libby covering [230] the operations of the Moser Bay Cannery, Kodiak Island, of fish caught and packed from the years 1941 to 1946, inclusive. It shows the fish caught from the Karluk area separate from that of other areas combined.

"Q. Was that record compiled under your supervision?

"A. It was compiled at my direction and under my instructions.

"Q. What was the source of the information therein contained?

"A. The records of our company and that of our predecessor.

"Mr. Arnold: We offer the exhibit in evidence.

"Mr. Arend: We reserve our objections, pursuant to the stipulation entered into."

Mr. Arnold: If the Court please, we offer Plaintiffs' Exhibit 15 of the deposition as Plaintiffs' Exhibit M in this cause.

Mr. Berrett: No objection.

The Court: It may be admitted.

(Thereupon Plaintiffs' Exhibit 15 for identification of the deposition was marked as Plaintiffs' Exhibit M in this cause by the clerk of the court.)

Mr. Arnold: We offer to stipulate that the exhibit shall be considered as read.

Mr. Berrett: We so stipulate.

The Court: Very well, it may be considered read.

"Q. (By Mr. Arnold): Mr. Graham, in your capacity as manager of the Salmon Division of Libby, McNeill & Libby, and in your capacity as president of the Alaska Salmon Industry, Incorporated, [231] are you familiar with the market price of canned salmon of the various species packed in Alaskan waters, and particularly on Kodiak Island?

"A. I am reasonably well familiar with it.

"Q. Since 1942, how have the market prices for canned salmon been established?

"A. In 1942 there was a ceiling placed on the market price of canned salmon by the OPA, and since that time there have been two increases established.

"Q. During all the time since the Office of Price Administration established a ceiling price on canned salmon, has that been the actual market price, or the price at which the product has been sold?

"A. It has been, unless somebody sold for less, which I do not think that they would do.

"Mr. Arnold: I will ask to have this document marked as Plaintiffs' Exhibit 16 for identification.

"(Thereupon the document above referred to was marked Plaintiffs' Exhibit 16 for identification.)

"Q. (By Mr. Arnold): I hand you Plaintiffs' Exhibit 16 for identification and I will ask you to state what the document consists of.

"A. This is a release from the OPA, dated November 10, 1942, identified as T-282, covering the

ceiling price of canned salmon, effective as of that date. I will stand corrected on that [232] last. That is my understanding. It was effective on that date, anyway. And it indicates the following varieties; style of container and price per case:

"Chinook 1/2 pound flats, \$12;

"Red, 1-pound talls, \$15;

"Pink, 1-pound talls, \$8;

"Chum, 1-pound talls, \$7.60;

"Alaska Sockeye, 1-pound talls, \$15;

"Puget Sound Sockeye, 1-pound talls, \$18.

"Q. What is the unit indicated?

"A. 48 cans per case. It also contains various other regulations covering the handling of the sale of salmon.

"Q. Will you state whether or not those are the ceiling prices which were in effect from that date through the calendar year 1945?

"A. Yes, they are.

"Q. Pardon? A. Yes, they are.

"Mr. Arnold: We offer the exhibit in evidence."

Mr. Arnold: If the Court please, we offer Plaintiffs' Exhibit 16 in the deposition as Plaintiffs' Exhibit N in this cause.

Mr. Berrett: We have no objection, your Honor, though I suppose the Court will take official notice of the maximum price regulations issued by the Office of Price Administration. [233]

The Court: I think no.

Mr. Berrett: We have no objection to its being admitted in evidence.

The Court: It may be admitted.

(Thereupon Plaintiffs' Exhibit 16 for identification in the deposition was marked, by the clerk of the court, as Plaintiffs' Exhibit N in this cause.)

Mr. Arnold: We offer to stipulate that the exhibit may be considered as read.

Mr. Berrett: We so stipulate.

The Court: Very well, it may be so considered.

“Mr. Arend: I would like to ask before it is offered, these increase that you spoke of, were they the only increases—

“Mr. Arnold: (Interposing): Maybe I can answer that. That is the reason why I put the question through 1945, because I have supplements here covering an increase in the price.

“Mr. Arend: Then I won't object to it.

“Mr. Arnold: I would like to have this marked as Plaintiffs' Exhibit Exhibit 17 for identification.

“(Thereupon the document above referred to was marked Plaintiffs' Exhibit 17 for identification.)

“Q. (By Mr. Arnold): During the calendar year of 1946, were the prices established by the Office of Price Administration pursuant to Plaintiffs' Exhibit 16 changed?

“A. They were. [234]

“Q. I hand you Plaintiffs' Exhibit 17 for identification and I will ask you to state what the document consists of.

"A. This is document No. 57433, from the Office of Price Administration, known as MPR 265, dated August 28, 1946, setting forth the price of various varieties—I should say species—and sizes of containers ~~as~~ in effect at the present time. Do you want me to read those prices?

"Q. Yes. Will you state what those prices are?

"A. Alaska King, one pound talls, \$17.32; Alaska Chinook, one pound flats, \$21.78;

"One-half pound flats, \$12.38;

"Alaska Red, one pound talls, \$18.56;

"One pound flats, \$19.18;

"One-half pound flats, \$12.38;

"Coho, one pound talls, \$14.36;

"One-pound flats, \$15.22;

"One-half pound flats, \$9.90;

"One-quarter pound flats, \$6.44;

"Pink, one pound talls, \$9.90;

"One pound flats, \$9.90;

"One-half pound flats, \$6.93;

"One-quarter pound flats, \$4.83;

"Chum, one pound talls, \$9.40;

"One-half pound flats, \$6.68;

"Copper River Sockeye, one pound talls, \$18.56;

"One pound flats, \$19.80;

"One-half pound flats, \$13.61;

"Puget Sound Sockeye, one pound talls, \$22.28;

"One pound flats, \$23.51;

"One-half pound flats, \$14.11.

"Do you want me to take in the Columbia River too?

"No. Are those prices that you have read rela-

tive to Alaska canned calmon the ceiling prices and market prices in effect as of this date?

"A. They are.

"Mr. Arnold: We offer the exhibit in evidence."

Mr. Arnold: We offer Plaintiffs' Exhibit 17 in the deposition as Plaintiffs' Exhibit O in this case.

Mr. Berrett: No objection.

The Court: It may be admitted.

(Thereupon Plaintiffs' Exhibit 17 for identification in the deposition was marked by the clerk of the court as Plaintiffs' Exhibit O in this cause.)

Mr. Arnold: We offer to stipulate that the exhibit may be considered as having been read.

Mr. Berrett: Let it be so stipulated.

The Court: Very well, let it be so stipulated.

"Mr. Arnold: That is all of Mr. Graham.

"Cross Examination

"By Mr. Arend:

"Q. Mr. Graham, who built the five independent boats to which you [236] now hold the title? I understand you are selling them on contract.

"A. I can only answer the question with reference to past history from hearsay, but I believe it was Jerry Bryant, here in Seattle.

"Q. How did you acquire them?

"A. We took them over by assignment, or, rather, we took over that assignment from the Far North Packing Company when we bought the cannery.

"Q. You are permitting the fishermen to buy the boats, are you?

"A. We are continuing with the same program.

"Q. It was already started when you took over?

"A. That is correct.

"Q. The purchase price?

"A. That is correct. We haven't made any such transaction or transactions of that kind during this year of our operations.

"Q. How far is Moser Bay—that is, the cannery at Moser Bay from the Karluk Reservation?

"A. I am not too familiar with that country, but I believe it is about eighty miles.

"Q. How many? A. Eighty.

"Q. Eighty.

"A. I think so. However, some of the rest of the people here know much more about that than I do. [237]

"Q. How far from Moser Bay do the boats that work for your company extend their operations?

"A. In excess of one hundred miles.

"Q. In excess of one hundred miles?

"A. Yes, sir.

"Q. These prices set forth in Exhibits 16 and 17 of the Plaintiffs do they constitute prices at which canneries may sell to the consumer, or to the middleman, or just what are they?

"A. They are the prices that the packer contracts for in selling his pack.

"Q. And do those prices determine what you will pay the fishermen for fish? • A. No.

"Q. They do not?

"A. They may have a connection, but they do not determine the amount that we pay the fishermen for fish.

"Q. Do you have any men engaged in fishing—actually fishing for you in the Karluk Reservation—whom you pay wages during the time that they are fishing? A. No.

"Q. How do you pay them?

"A. They are paid on a piece basis, so much per fish caught.

"Q. And do you have the same relative price differences for fishermen on independent boats—fishermen on company boats and fishermen on contract boats as have been testified to here by [238] Mr. Gepner and some of the others?

"A. That is correct. We adhere to the same set price.

"Q. Does your company regard the fishermen on the company owned boats as employees of the contract fishermen—rather, as employees, or contract fishermen?

"A. That is a question which is under advisement at the present time. I am not in any position to answer it, because it is being taken up legally and otherwise to determine that.

"Q. You leave it to the court to determine it in this case, do you?

"A. At least I cannot answer it.

"Q. Have you prepared a list of your boats that were fishing in the Karluk Reservation this last year?

"A. No, I have not. I have not a list of the names of them.

“Q. Can you obtain those for us?”

“A. Yes, I can get them for you in a few hours. You would like the independent and the company boats separately?”

“Q. Yes, and those that are being purchased, with the name of the captain of each boat.

“A. Yes, I can get them for you.

“Q. Will you do so, and furnish them to the Commissioner, who will insert them in the record at this point as your testimony in that regard?”

“(Witness furnished the Commissioner with the information requested, said information reading as follows:) [239]

Independent Boats	Crew Members	Fished Karluk
Kerry	Nick Wolkoff	Yes
	Paul Wolkoff	“
	Cecil Hartman	“
Sherry	Pete Wolkoff	Yes
	Carl Panamatloff	“
	W. Watkins	“
	Nick Malitnak	“
FNP #1	Teacon Peterson	No
	Willie Eluska	“
	Philip Rastopsoff	“
Traveler	Joe Suryan	Yes
	A. O. Christenson	“
	John Chieoratieh	“
	John Rock	“
	George Bowman	“
Don't Worry	Frank Suryan	Yes
	Jack Kamps	“
	Robert Dunkin	“
	Chas. Springer	“
	Helmer Malland	“

Independent Boats	Crew Members	Fished Karluk
Attu	Dick Zuanich	Yes
	John Wilkinson	"
	Jack Meyers	"
	Don Johnson	"
	Don Davis	"
Dew Drop	John Suryan	Yes
	Art Graves	"
	Alvin Sparks	"
	Bob Verrall	"
	Ray Bebich	"
Antwin	Tony Suryan	Yes
	Ed Buyan	"
	Milton Johnson	"
	Ben Luque	"
	Wm. Burgess	"
Pride	Tony Anich	Yes
	John Anich	"
	Rudy Anich	"
	Rudy Anich	"
	Steve Bebich	"
	Don Burkland	"
Company Boats	Crew Members	Fished Karluk
Adak	Joe M. Suryan	No
	Louis Padovan	"
	John Gugich	"
	Richard Suryan	"
	Vladimir Seman Jr.	"
Kiská	John B. Suryan	Yes
	Jim Toland	"
	Earl Sparks	"
	Lloyd Suryan	"
	Victor Haglund	"

“Q. (By Mr. Arend): Mr. Graham, were any of your boats, or gear, or the boats and gear of fishermen working for your company seized by the Department of the Interior, or any of its agents

during 1946 for violation of the regulation at Karluk Reservation? A. No.

“Q. Were any of the men working for you arrested by the Department of the Interior, or its agents, for fishing in the reserved area during 1946?

“A. Not that I heard of.

“Q. The only so-called threats that you have heard about are those that you state are contained in the telegram, Plaintiffs' Exhibit 4?

“A. In addition to those, we had representatives in Kodiak during the period when the Fish and Wildlife representatives were there, during the negotiations earlier in the season, and we received in a roundabout way the information that the regulations with reference to the Karluk Reservation were going to be enforced. That was verbal.

“Q. Were those negotiations at Karluk or at Kodiak?

“A. They were at Kodiak. Our people were in Kodiak at the time [242] that statements were made which were passed on to us, that indicated that the regulation was going to be enforced.

“Mr. Arend: That is all.

“Mr. Arnold: That is all.

“(Witness excused.)” [243]

“O. L. GRIMES,

“called as a witness on behalf of the Plaintiffs, having been first duly sworn by the Commissioner, was examined and testified as follows:

“Direct Examination

“By Mr. Arnold:

“Q. State your name and address.

"A. O. L. Grimes, 1887 Shelby Street, Seattle.

"Q. What is your occupation, Mr. Grimes?

"A. I am in the fish canning business and in the mercantile business.

"Q. Do you operate a salmon cannery on Kodiak Island?

"A. Yes, sir. It is on Spruce Island right across the narrows from Kodiak shores. The cannery is located on Spruce Island.

"Q. Are you one of the plaintiffs in this action?

"A. I am, yes.

"Q. Under what trade name and style do you operate your cannery?

"A. Grimes Packing Company.

"Q. Is that a corporation? A. No.

"Q. You are the owner of the Grimes Packing Company?

"A. I am the sole owner, yes.

"Q. How long have you been engaged in the operation of a salmon cannery on Kodiak Island?

"A. Since 1927—each year since 1927.

"Q. Where is your plant located? [244]

"A. On Spruce Island.

"Q. At what place? A. At Ouzinkie.

"Q. And the plant has been operating since 1927 and every year since?

"A. And every year since, yes.

"Q. What is the approximate value of the plant and shore facilities?

"A. I would say a hundred and fifty thousand dollars.

"Q. What is the approximate investment in ten-

ders, fishing gear and other equipment used in the operation of your plant at Ouzinkie?

"A. Just as an estimate. I think the boats and the equipment would be about two hundred thousand dollars.

"Q. Will you state the number of employees, as distinguished from fishermen, that you transported to the cannery from points not on Kodiak Island in preparation for the 1946 season?

"A. I have that here noted down. Forty-six.

"Q. State the number of fishermen that you transported to the cannery from points not on Kodiak Island.

"A. Eight. Only eight men from here.

"Q. State the number of fishermen that were engaged in connection with the operation of your plant at Ouzinkie on Kodiak Island in 1946.

"A. There were forty-five on the purse seine boats, and I had a [245] few gill netters. I haven't that information where I could give it accurately.

"Q. Forty-five on the purse seine boats?

"A. Yes.

"Q. Do your purse seine boats fish at Karluk within the area of the Karluk Indian Reserve?

"A. Yes.

"Q. How long have they fished there?

"A. Oh, since about 1930. I didn't go down there any earlier than that. I think along about 1930.

"Q. 1930? A. Yes.

"Q. And have your boats been down there every year since? A. Every year.

"Q. Including 1945 and 1946? A. Yes.

"Q. State whether during the years prior to, but not including 1946, your company's operations on Kodiak Island were interfered with in any manner by the Karluk natives, or by the Office of Indian Affairs.

"A. Well, nothing more than the regulations. We were advised to stay out of that area—out of the Karluk area.

"Q. Well, state whether or not you or your fishermen were threatened with prosecution, or arrest, or seizure of their gear if they did fish in the area covered by the Karluk Reservation. [246]

"A. They were.

"Q. Coming now to the year 1946, Mr. Grimes, what occurred in connection with the efforts of your fishermen to fish in the Karluk area?

"A. Well, the ruling was made there that they be required to get permits, and I think some of my men did get permits.

"Q. Were they threatened with prosecution, arrest, or seizure of their boats and gear if they failed to obtain permits? A. Yes, I think so.

"Q. Were you advised of telegraphic instructions sent by the defendant, Frank Hynes, to Mark Meyer, the warden for the Fish and Wildlife Service on Kodiak Island, relative to the enforcement of the regulation prohibiting fishing within the Karluk Reserve except by inhabitants of the Reserve or persons authorized by them? A. Yes, sir.

"Q. When and where did you learn of that telegram?

"A. At a meeting of the salmon industry down here.

"Q. Here in Seattle? A. Yes.

"Q. At what date?

"A. I think that that was the 28th of May.

"Q. The 28th of May, 1946? A. Yes.

"Q. If your boats had been prohibited from fishing at Karluk during [247] the season of 1946, what would have been the effect on the operations of your cannery at Ouzinkie on Kodiak Island?

"A. It would have meant quite a loss had we not fished in the Karluk area.

"Q. Did a substantial portion of the fish that you canned in 1946 come from the Karluk reserve?

"A. Yes.

"Q. If your fishermen had been prohibited from fishing there, would it have been possible for them to have obtained an equal amount of fish elsewhere?

"A. I do not think so.

"Q. Have you prepared an estimate, or statistics, or figures showing the pack for your cannery at Ouzinkie on Kodiak Island, and the total catch of fish for the years from 1941 to 1946, and the percentage of that catch and pack applicable to fish taken in the Karluk Reserve? A. Yes, I have.

"Mr. Arnold: I ask to have this document marked as Plaintiffs' Exhibit 18.

"(Thereupon the document above referred to was marked Plaintiffs' Exhibit 18 for identification.)

"Q. (By Mr. Arnold): I hand you Plaintiffs'

Exhibit 18 for identification; and I will ask you to state what the document is.

"A. This is an estimate of the fish caught during the years 1941 to 1946, and the number of fish taken from the various areas, [248] including the Karluk Reservation.

"Q. Was that exhibit prepared under your supervision, Mr. Grimes?

"A. I prepared it myself.

"Q. Is it based on the records and information from your company?

"A. Yes. The reason I made this an estimate, I did not have the records here except for the 1946 year—for this year—this last season. I had the number of cases packed for each year. I had to take that and multiply it by the number of fish per case to get this estimate.

"Q. But you did have the figures for the season of 1946 accurate?

"A. Yes, I had them accurate. Yes, I had the figures of that.

"Q. What percentage of the total fish canned at your plant in 1946 came from within the area covered by the Karluk Reserve?

"A. Twenty-five per cent of the Reds; eighty-five per cent of the Pinks, and fifty per cent of the Chums, and fifty per cent of the Cohoes.

"Q. How many cases did you pack at your cannery in 1946? A. 40,030.

"Q. 40,030? A. Yes, sir.

"Q. If you had been deprived of the fish which your fishermen took in the Karluk Reserve, what

financial loss, if any, would have been incurred in connection with the operation of your plant at Ouzinkie this year?

"A. Well, my estimate would be between fifty and seventy-five, [249] thousand dollars loss on the year's operations.

"Q. From a financial standpoint, can you continue to operate your plant at Ouzinkie if your fishermen are prohibited from taking fish from within the Karluk Reserve?

"A. No. I think it would be quite hazardous if one were to do it that way.

"Mr. Arnold: I will offer Plaintiffs' Exhibit 18 for identification in evidence."

Mr. Arnold: At this time, we offer Plaintiffs' Exhibit 18 in the deposition in evidence as Plaintiffs' Exhibit P in this case.

Mr. Berrett: No objection.

The Court: It may be admitted.

(Thereupon Plaintiffs' Exhibit 18 for identification in the deposition was marked, by the clerk of the court, as Plaintiffs' Exhibit P in this cause.)

Mr. Arnold: I offer to stipulate that the exhibit shall be considered as read.

Mr. Berrett: We so stipulate.

The Court: It may be so considered.

"Q. (By Mr. Arnold): Mr. Grimes, when did you first go to Alaska? A. In 1908.

"Q. How old are you, if that is no secret?

"A. Well, I am sixty-six.

"Q. Have you resided in Alaska since 1908?

"A. Well, I have been out the last three or four years. [250]

"Q. Will you just state briefly where you have resided in Alaska from 1908 down to the present time?

A. At Ouzinkie.

"Q. At Ouzinkie?

A. Yes, sir.

"Q. What business were you engaged in there since 1908?

"A. I started in the mercantile business—in with a small store, and then branched from that into the cannery business.

"Q. Then you have been in business at Ouzinkie, Kodiak Island, either as a merchant or as a salmon packer, or both, from 1908 down to the present time?

A. Yes.

"Q. How big a place is Ouzinkie?

"A. At the present time I think there are two hundred and seventy-five people there.

"Q. What would be the proportion of Alaskan natives, or people of native Indian blood?

"A. About ninety-five per cent, or perhaps more.

"Q. Is Ouzinkie located in the area covered by the Karluk Indian Reservation?

A. No.

"Q. What is the principal means of livelihood of the residents of Ouzinkie?

A. Fishing.

"Q. Under the regulation promulgated by the Fish and Wildlife [251] Service, relative to fishing within the Karluk Indian Reserve are the natives or the people of Ouzinkie entitled to fish there?

"A. I think so. They have been fishing there ever since I have been there—they have been fishing at Karluk.

"Q. Well, under the regulation issued by the Fish and Wildlife Service in 1946, does that prohibit the natives of Ouzinkie—

"A. (Interposing): That would prohibit the natives, yes.

"Q. Does that prohibit the natives of Ouzinkie from fishing there without a permit? A. Yes.

"Q. Prior to the years that you operated a cannery there, since 1908, do you know whether some of the native fishermen in Ouzinkie fished down at Karluk?

"A. Yes. The ancestors of these men and most of the older ones fished there, and then the younger ones fished after the older ones, and when I first came there they fished there right along at Karluk—that is, the older ones.

"Q. Your fishermen that you speak of, the company and independent fishermen, are they principally natives of Ouzinkie?

"A. Yes, the majority of them are. I would say that ninety per cent of my fishermen are natives.

"Q. And are they residents of Ouzinkie?

"A. Yes.

"Q. And they are the people, then, who were threatened with [252] prosecution and seizure of their boats and their gear if they fished in the Karluk Reservation in 1946? A. Yes.

"Q. Captain Grimes, reverting now to your company fishermen, do you carry employers' liability insurance on them? A. Yes.

"Q. During the time that they are engaged in fishing? A. Yes.

"Q. You pay them on a piece basis, so much per fish, do you? A. Yes, sir.

"Q. But you treat them as your employees for liability purposes?

"A. Yes. I have been paying that right along—liability insurance on them.

"Mr. Arnold: I think that is all.

"Cross Examination

"By Mr. Arend:"

"Q. Is that the only sense in which you treat them as employees, by paying this liability insurance?

"A. Yes, I think so. My insurance company—before I started this, I lost one or two there. They moved from where I had put the gill netters and went to a new place and set their net, and capsized their boat, and two of them were lost. After that I started carrying liability insurance on all of them.

"Q. How many boats do you have fishing in the Karluk area? [253]

"A. Not being up there—I was only up there a little while, so I cannot answer that directly or exactly, but I think there were fifteen boats.

"Q. Are all those boats owned by the company—by you?

"A. We own fifteen, and then we had some under contract.

"Q. Who provides the captains for the boats that you own? A. Pardon?

"Q. Who provides the captains for the boats that you own?

* "A. Usually some of the leading natives will come and ask for a boat, and then the leading native, usually goes as the captain and, picks out his men. I try to give each one of the natives in the village a boat to fish with, and usually some leading native who is considered a better fisherman will ask for the boat. Well, we turn the boat over to him, and then he usually picks for his gang fellows that he likes.

"Q. Are they Ouzinkie natives? A. Yes.

"Q. How far is your cannery from Karluk itself—from the Reservation?

"A. I think it is seventy-five miles.

"Q. And do you compensate these fishermen on the boats that you own in the same manner as these other men that you have testified about?

"A. Yes, under a union contract.

"Q. You stated that threats of arrest and seizure were made. By [254] whom were those threats made, Captain?

"A. Nothing more than this ruling and that telegram. I was not up there, but I did wire up and asked my man—the superintendent—to tell my fishermen not to get permits. Some of them had already gotten permits at that time, but I didn't want them to go and get permits.

"Q. When you said, 'my fishermen,' whom did you mean? The captains?

"A. No. We consider all of our boats, the crews on them, our fishermen, but I just wired to the superintendent up there.

"Q. You merely advised them, didn't you?

"A. I merely advised them.

"Q. You had no way to enforce such an instruction? A. No, and he didn't have, either.

"Q. You know—do you know whether any of the fishermen from Ouzinkie have been denied a license— A. (Interposing): No.

"Q. (Continuing): to fish in the Karluk area?

"A. I don't know.

"Q. You don't know? A. No.

"Q. Can you tell us whether the natives who are now residing at Karluk are the original native residents of that area, or are there others who drifted in there recently?

"A. There are others. Some of the originals have drifted away [255] from there, and we have in Ouzinkie now some Karluk fellows fishing for me—Karluk fellows that moved up there.

"Q. Can you state how many natives reside in the Karluk Reservation area?

"A. No. I do not know what the population is.

"Q. Has the take of salmon at Karluk been increasing or decreasing over the period of years that you have fished there, judging from the experience that you have had around there?

"A. Well, I think it has decreased some. In 1946, however, it was greater than any run that I have seen there.

"Q. Are you opposed to conservation tactics there by the Department of the Interior?

"A. At Karluk—yes.

"Q. Are you opposed to conservation in general?

"A. No, I am not opposed to conservation in general.

"Q. Your contention is with the reservation system, isn't it? A. Yes.

"Q. Would you be able to supply for the record a list of the boats and captains of your company there?

"A. I think so, but I cannot get you that list before tomorrow. I would have to get hold of my foreman, and I think he would remember the names of all of them.

"Q. I wish you would supply that list for the record, and is it agreeable to you, Mr. Arend, if that list as supplied by Mr. Grimes is incorporated into the record as part of his testimony? [256]

"Mr. Arend: That is satisfactory to me.

"(Thereafter the Commissioner was furnished by the witness with the following list, which is incorporated herewith:)

"G. P. Co. 8—Captain, Bill Boskoffsky.

"G. P. Co. 9—Captain, Peter Squartsoff.

"G. P. Co. 10—Captain Mike Wasbrakoff.

"G. P. Co. 11—Captain Fred Pestrikoff.

"G. P. Co. 12—Captain Fred Torsen.

"G. P. Co. 13—Captain, Dick Yagashoff.

"G. P. Co. 14—Captain, John Shanagin.

"G. P. Co. 15—Captain, John Anderson.

"G. P. Co. 16—Captain Henry Eaton.

"G. P. Co. 18—Captain, G. S. Gugel—Contract boat.

"G. P. Co. 19—Captain, Ken Olsen.

"G. P. Co. 20—Captain, Pete Unga.

"G. P. Co. 21—Captain, Ted Pestrikoff.

"Theresa T.—Captain, James Toteff—Contract boat.

"All captains are native, except Gugel, Olsen, and Toteff.

"Mr. Arnold: That is all.

"Mr. Arend: That is all.

"(Witness excused.) [257]

"GORDON JENKINS

"called as a witness on behalf of the Plaintiffs, having been first duly sworn by the Commissioner, was examined and testified as follows:

"Direct Examination

"By Mr. Arnold:

"Q. Will you state your name and address?

"A. Gordon Jenkins, 3116 West Ray Street, Seattle.

"Q. What is your occupation?

"A. Cannery superintendent, Kadiak Fisheries Company.

"Q. What cannery are you superintendent for the Kadiak Fisheries Company?

"A. The Port Bailey Cannery.

"Q. Where is that cannery located?

"A. It is located in Dry Spruce Bay on Kadiak Island.

"Q. How long have you been employed by the Kadiak Fisheries at their Port Bailey Cannery?

"A. Since 1938.

"Q. During the season of 1946, or prior to the opening of fishing in 1946, did you have any conversation with Mr. Mark Meyer, the warden for the Fish and Wildlife Service on Kodiak Island, or with Mr. Louis Mueller, Special Agent of the Indian Service and of the Fish and Wildlife Service, or with a Mr. Brunskill, Special Agent of the Indian Service and of the Fish and Wildlife Service, relative to the enforcement of the fish and wildlife regulations prohibiting fishing within the area [258] embraced by the Karluk Indian Reservation, except by Karluk inhabitants or those authorized by them?

"A. I had a conversation with Mr. Meyer at Kodiak on the day of my arrival there from Seattle.

"Q. What date was that?

"A. That was April 18th or 19th, I am not certain which.

"Q. Of 1946? A. Of 1946, yes.

"Q. All right.

"A. And I mentioned that this new regulation had appeared in the general fishery regulations applicable to the Kodiak area, and I asked him what his attitude would be toward the regulation. He said that he had not been officially informed of it as yet, and did not have a copy of the regulation, but that he had seen the regulation which appeared in the Federal Register. And that inasmuch as it was incorporated in the fishery regulations, he considered that it would be necessary for him to enforce the regulation and prosecute any violations of that regulation, the same as he would a violation of any other of the regulations.

"Q. Did you have any conversation with Mr. Mueller or Mr. Brunskill about this matter?

"A. No; I didn't see Mr. Mueller during that summer. And if Mr. Brunskill was the Special Enforcement Agent, there was a man at our cannery this fall on the way out, but I don't recall [259] his name, whether it was that same man or not.

"Q. Did any of your fishermen discuss the situation with you relative to enforcement of this regulation and the likelihood of their arrest and the seizure of their gear?

"A. Yes. A number of them discussed it with us. They were very much concerned with the regulation. They felt that it might have a definite effect on their earnings for the 1946 season, and they were in some doubt as to what attitude they should take. They had been advised by their union that it was very important for them to take out the permits, otherwise they would be in jeopardy.

"Q. Otherwise they would be in jeopardy?

"A. Yes, sir.

"Q. Meaning what?

"A. Meaning that they would be subject to punishment or to seizure of their gear if they fished in the Reservation.

"Q. Did any of your fishermen refrain from fishing in the Karluk Reserve on account of this regulation during any part of the season?

"A. Well, they all refrained in the early part of the season, I believe, from fishing inside of the markers that were set out.

"Q. How long did they continue to do that?

"A. Well, fishing was not particularly good at Karluk in the early part of the season and many of them went elsewhere—scattered out to fish. As I say, the fishing was so poor that [260] there was no incentive particularly for them to risk a violation of the boundary markers. But when the heavy run of pink salmon showed up at Karluk, it was my understanding that all of the boats fished inside and outside of the buoys. I mean the companies' boats, regardless of whether they were ours or boats of other companies.

"Q. What had happened by that time with reference to this case?

"A. By that time an injunction had been issued by the court at Fairbanks prohibiting the enforcement of the regulation.

"Mr. Arnold: That is all.

Cross Examination

"By Mr. Arend:

"Q. Was there anyone else present when you had this conversation with Mark Meyer on April 18th or 19th, 1946?

"A. There was another party there, but I don't recall who it was. I remember that another party and myself were walking from the dock up past Mr. Meyer's house, and we stopped and engaged in conversation, but I don't recall who was with me at the time.

"Q. Was he a Government official?

"A. No, he was not a Government official.

"Q. He was not? A. No.

"Mr. Arend: That is all.

Redirect Examination

"By Mr. Arnold: [261]

"Q. How long have you been at Port Bailey?

"A. Since the first year that the cannery operated, in 1938.

"Q. Since 1938? A. Yes, sir.

"Q. There has been some discussion in the previous testimony here about what has been designated as contract boats, or the practice of the company selling fishermen boats on conditional sales, or transferring title and taking a marine mortgage. During the period of your familiarity with the operations on Kodiak Island how long has that practice been in existence, and how widespread is it?

"A. I would say that it had its beginning since 1943 in general practice. It started about 1943 or 1944.

"Q. And what is the policy or purpose of your company in selling boats to fishermen?

"A. Well, primarily it has been at the request of the fishermen. They felt that by buying and owning their own boats they would be able to earn more money—in other words, get into business for themselves. And it would be to their advantage to own the boat if fishing were such that they obtained large catches; that the difference between what they would receive for fishing—being paid for what we call company gear price—company paid price and

independent price—the difference between those two would net them a profit on a large catch.

“Q. Do most of the companies on the island follow that practice [262] at the present time?

“A. It is general on the island at the present time.

“Mr. Arnold: That is all.

“Mr. Arend: That is all.

“(Witness excused.) [263]

“STEELE CULBERTSON,

“called as a witness on behalf of the Plaintiffs, having been first duly sworn by the Commissioner, was examined and testified as follows:

“Direct Examination

“By Mr. Arnold:

“Q. What is your name?

“A. Steele Culbertson.

“Q. Where do you live?

“A. 1900 Taylor Avenue, Seattle, Washington.

“Q. What is your present occupation or employment?

“A. Assistant Manager Alaska Salmon Industry, Incorporated.

“Q. How long have you been in that employment?

“A. Since the latter part of February, 1946.

“Q. What was your occupation prior to that time?

“A. I was Fishery Management Supervisor for the Fish and Wildlife Service, in charge of the Alaska fishery operations.

"Q. How long did you hold that position?

"A. I was approximately two years in that position.

"Q. How long were you in the employ of the Fish and Wildlife Service in Alaska altogether?

"A. Approximately twelve years. I began working for the old Bureau of Fisheries in 1931. I worked a couple of years for the Bureau, and finished school, and then went back in 1935.

"Q. During the period that you were employed by the Fish and Wildlife Service, what contract did you have with fishery [264] operations—what contact did you have with fishery operations on Kodiak Island?

"A. In 1937 and 1938 and half of 1939 I was the agent in charge of the Kodiak district.

"Q. Were you what is referred to here as the warden? A. As the warden, yes.

"Q. And during the two-year period that you were Fishery Management Supervisor, what was your connection with Kodiak Island?

"A. Well, the agents for the various districts in Alaska, of which Kodiak is one, operate under the Juneau office, under the fishery supervisor there. In other words, the fishery supervisor at Juneau supervises the fishery programs in all of the districts.

"Q. And during that period the warden on Kodiak Island operated under your supervision?

"A. That is right.

"Q. Were you on Kodiak Island in the year 1946? A. Yes.

"Q. Do you know Mark Meyer, the present warden or agent for the Fish and Wildlife Service on Kodiak Island? A. I do.

"Q. Did you have any conversation with Mark Meyer relative to the regulation promulgated by the Fish and Wildlife Service for 1946 prohibiting fishing within the boundaries of the Karluk Indian Reservation except by inhabitants of the Reservation or [265] persons authorized by them?

"A. I did.

"Q. State what that conversation was.

"Mr. Arend: May we first have when and where this took place?

"Mr. Arnold: Yes.

"Q. (By Mr. Arnold) When did the conversation occur, and where?

"A. It occurred—I will have to refer to my notes, if I may, which will show when I sent the wire (referring to calendar). It occurred on Saturday. I sent the wire on the 27th. Saturday was the 25th. It was between the 25th of May—

"Q. (Interposing) 1946?

"A. 1946 and the 27th of May—the day that I sent the wire—that I had the conversation with him.

"Q. Where did you have the conversation with him?

"A. At Kodiak—at his office there. I met him on the street and he told me that he had received this wire, and he was tellin me about it, and I asked him if I might go up and see it, and he begged me to come up and see the wire, and I read it.

I then asked him if I might make a copy of it and he said that I might. And I copied the wire, and then went down and included it in this wire that I sent to you, Mr. Arnold, on the 27th.

“Q. You sent a wire on the 27th in which you included, or incorporated, a copy of the wire received by Mark Meyer? A. That is correct.

“Q. From Frank Hynes, the defendant in this case? A. That is correct.

“Q. I call your attention to Plaintiffs' Exhibit 4, in this case, and I ask you if that is the wire which you sent, incorporatin the wire from Hynes to Meyer, a copy of which was furnished to you by Meyer?

“A. That is the wire that I sent incorporating this wire—that is the wire that I sent, incorporating in this wire and the wire and quoting the wire that Mr. Meyer received from Mr. Hynes in Juneau.

“Q. What other conversation did you have with Meyer at that time, if any?

A. Well, the burden of it was—well, we spoke a little about the burden of enforcement of it, and at that time Mr. Meyer didn't know whether he would have any assistance in the enforcement or not. He being familiar with fishing regulations, why he knew as well as I did that it would be his duty to enforce the regulation contained in the new fishery regulations regarding the Reservation.

“Q. Did Meyer indicate in any way whether he considered these instructions confidential?

“A. Apparently not, because when I asked him if I might copy it I told him that I felt that it

was very important to us, and that I wanted to transmit a copy of it down here to Seattle, because it would materially affect the operations of our clients there on Kodiak Island. [267]

"Q. Did he say anything to indicate in any way whether he intended to notify the operators on Kodiak Island of the receipt of this wire or the policy established by the instructions received?

"A. Well, he did notify those that were in Kodiak.

"Q. He did that? A. Yes.

"Q. Did you have any conversation with Mr. Meyer at a later date about his matter?

"A. Well, after the receipt of a wire from Mr. Hynes at a later date, he also mentioned that.

"Q. Were you on Kodiak Island at the time this restraining order or injunction was issued?

"A. No, I was not.

"Q. You had left there by that time?

"A. Yes, sir.

"Q. Did you see Mr. Louis Mueller or Mr. Brunskill on Kodiak Island?

"A. No. They had not arrived when I left.

"Q. They had not arrived? A. No.

"Q. What was the purpose of your visit to Kodiak at that time?

"A. To negotiate the fishing agreement with the union, and also the cannery agreement—the cannery workers' agreement.

"Q. Did you discuss, or hear this matter of the Karluk regulation [268] discussed by the fishermen, or among the fishermen?

"A. Yes. While it did not occupy any time in our meetings, there were recesses, and it was mentioned at different times.

"Q. What was the attitude of the fishermen with respect to fear or lack of fear of prosecution or seizure of their gear in the event that they fished within the Karluk Reserve?

"A. Well, I believe most of the fishermen decided to observe the regulation at least to the extent of not being apprehended, and Karluk being a place that was particularly watched, why most of them felt that it was too great a risk not to comply with the regulation, either through not fishing in there or getting a permit. Because in the case of an arrest, why it is normal for a fishing boat and the crew to lose several days in court action, in addition to whatever fine they might get, and in those cases the loss in time from fishing is greater than the penalty imposed by the court for violation.

"Q. What would be the mechanics of the arrest or seizure of gear at Karluk for violation of this regulation or any other fishery regulation?

"A. Well, the arresting officer would first take the names of the men on the boat, and the boat, and the circumstances concerning the operations at the time, and either take the boat in tow, and if it had fish aboard take it to the nearest cannery and dispose of the fish, or if the fishermen would agree to go on their initiative, why they would run into the cannery [269] and dispose of the fish, or if the fishermen would agree to go on their initiative, why they would run into the cannery and dispose

of the fish to the cannery, in which case the receipt for the fish would be made payable to the Fish and Wildlife Service. And, of course, in the case of Kodiak, I think there are two commissioners' courts there, one at Kodiak and one at Afognak, and it would mean taking the crew right into one of those two villages and arranging the time convenient to the commissioner to hold a trial. And then if they were fined, why they would have to pay the fine, and if they didn't have the money, they would have to raise it, and then they would have to go back up to the fishing grounds, which might involve another day, or something like that.

"Q. Do the Government authorities or the officials of the Fish and Wildlife Service, or the District Attorney have the option of forfeiting the boat and gear also?

"A. Not in the commissioners' court, they would not, but through the action of the district court they would have.

"Q. Is that procedure normally followed in the enforcement of fishery violations on Kodiak Island?

"A. That is correct.

"Q. Is that procedure one that is understood by the fishermen on Kodiak Island?

"A. By a number of them, at least, who have experienced such arrest. [270]

"Mr. Arnold: That is all.

Cross Examination

"By Mr. Arend:

"Q. Mr. Culbertson, did Mr. Meyer at any time

state in his own words that he was going to enforce the regulation?

"A. To the best of his ability, yes.

"Q. He did so state? A. Yes, sir.

"Q. In this conversation in May, 1946?

"A. Yes. He said that with the equipment that he had there that naturally he would have to enforce that regulation the same as any other.

"Q. And that statement was made with reference to this telegram, Exhibit 4, that you have before you there?

"A. Well, prior to that he had received the amendments to the 1946 regulations, which contained the prohibition against fishing there in the Reservation.

"Q. Well, did he indicate that he was going to go beyond the instructions contained in this telegram, Plaintiffs' Exhibit 4? Are you familiar with the telegram?

"A. Yes. What he indicated was that he would attempt to enforce the regulation, the same as any other regulation contained in the Kodiak area.

"Q. You realize that the telegram merely asked him to arrange for a test case on the first day of the season, don't you? [271]

"A. Well, that would actually mean enforcement of the regulation if he apprehended one of the boats out there and took him in to Kodiak.

"Q. Did he say that he was going to arrest everybody that violated the regulation, or attempted to?

"A. Well, he hoped, I guess, that they would not all violate it.

"Q. I am only trying to get at what he actually said.

"(Witness does not answer.)

"Mr. Arend: I have no further questions. That is all.

"Mr. Arnold: That is all.

"(Witness excused.)

"Mr. Arnold: That concludes our list of witnesses.

"(Depositions concluded.)

"State of Washington,

"County of King—ss.

"This Is to Certify that before me, E. E. Lescher, a Notary Public in and for the State of Washington, residing at Seattle, there appeared upon the 18th day of October, 1946, at the hour of ten o'clock a.m., Howard Bailey, Frank McConaghy, F. A. Gepner, George W. King, Guy V. Graham, O. L. Grimes, Gordon Jenkins and J. Steele Culbertson, witnesses on behalf of the plaintiffs in the above-entitled cause, W. C. Arnold, Stanley B. Long, Frank L. Mechem and Edward F. Medley, attorneys for the plaintiffs, and Harry O. Arend, attorney for the defendant, for the taking of the said depositions: [272] that I then and there duly swore the said witnesses, and each of them, to tell the truth, the whole truth, and nothing but the truth in response to questions put to them by counsel herein, and thereupon the questions set forth in the fore-

going pages, numbered 1 to 201, inclusive, were put to them by the various counsel and the answers made by them as shown on said pages; that I truly and carefully took down in shorthand the said questions and answers, which I have transcribed into typewriting as set forth in the foregoing pages, numbered 1 to 201, inclusive, which constitute a full, true, and correct transcript of all the questions and answers and proceedings held at the taking of said depositions; that pursuant to stipulation the signing of the depositions by the respective witnesses was waived.

"In Testimony Whereof, I have hereunto subscribed my name and affixed my notarial seal this 22d day of October, 1946.

"(Seal) E. E. LESCHER.

"Notary Public in and for the State of Washington, residing at Seattle.

"My commission expires: November 11, 1948."

The Court: We will take a recess until tomorrow morning at ten o'clock.

(Thereupon court was adjourned until ten o'clock a. m., October 29, 1946, at which time it was duly reconvened, and [273] the following proceedings took place:)

The Court: Are counsel ready to proceed with the trial of Grimes Packing Company and others against Hynes?

Mr. Arnold: Plaintiff is ready.

Mr. Berrett: We are ready.

Mr. Arnold: If the Court please, we will call Mr. Turner as a witness.

CHARLES TURNER

called as a witness on behalf of the plaintiffs, having been first duly sworn by the Clerk of the Court, was examined and testified as follows:

By Mr. Arnold:

Q. State your name and address:

A. Charles Turner, 637 West Eightieth Street, Seattle.

Q. What is your occupation?

A. Outside foreman, Kodiak Fisheries, Port Bailey.

Q. Where is the Port Bailey plant of the Kodiak Fisheries located?

A. It is thirty-two miles from Kodiak town in the Kupreanof Straits.

Q. Is that on Kodiak Island?

A. Yes, it is.

Q. How long have you been employed by the Kodiak Fisheries? A. Since 1937. [274]

Q. What was your occupation prior to that time?

A. I was with the Bureau of Fisheries.

Q. Where were you stationed with the Bureau during your employment by the Bureau of Fisheries? A. In Bristol Bay and Kodiak Island.

Q. How many years were you employed by the Bureau of Fisheries on Kodiak Island?

A. It was seven years.

Q. What years were those?

A. 1931 to 1937.

Q. In what capacity were you employed on Kodiak Island by the Bureau of Fisheries?

(Testimony of Charles Turner.)

A. In '31 and '32 I was counting fish on a weir in Olga Bay, and in '33 I was warden for the Bureau of Fisheries on Karluk, and in '34, '35, and '36 I was warden for the district.

Q. Since 1937 you have been an employee of the Kodiak Fisheries? A. That's right.

Q. What is your present capacity and duties for the Kodiak Fisheries?

A. I look after the floating equipment and the fishing.

Q. Were you on Kodiak Island during the fishing season of 1946? A. Yes, I was.

Q. Are you familiar with the boundaries and location of the Karluk Indian Reservation established by Public Order No. 128? [275]

A. Yes, I believe I am.

Q. What is the area covered by the reservation?

A. The one boundary is at the mouth of the Sturgeon River, and it runs in a northeastern direction to Wolcott Reef.

Mr. Arnold: If the Court please, Plaintiffs' Exhibit No. 2 in the depositions was not received in evidence in this case. I should like now to have Plaintiffs' Exhibit No. 2 in the depositions marked as Plaintiffs' Exhibit Q for identification in this case.

The Court: Very well.

(Thereupon the above-mentioned chart was marked as Plaintiffs' Exhibit Q for identification by the clerk of the court.)

(Testimony of Charles Turner.)

Q. Mr. Turner, I hand you Plaintiffs' Exhibit Q for identification in this cause and ask you to describe generally what the exhibit consists of.

A. Well, it is a section of a chart that runs from almost the Red River and divides Uyak Bay.

Q. Where?

A. On Kodiak Island.

Q. Does that exhibit—Does that chart cover the area embraced in the Karluk Indian Reservation?

A. Yes, it does.

Q. Based upon your knowledge and experience of the area, is that a correct chart of that general area? A. Yes, I would say it was. [276]

Mr. Arnold: If the Court please, we offer the exhibit in evidence.

Mr. Berrett: We have no objection.

The Court: It may be admitted.

(Thereupon Plaintiffs' Exhibit Q for identification was marked Plaintiffs' Exhibit Q by the Clerk of the Court.)

Q. (By Mr. Arnold) Referring now to Plaintiffs' Exhibit Q, can you point out from the exhibit the area embraced in the Karluk Indian Reservation?

A. Well, the western extremity of it, it is nearly the mouth of the Sturgeon River, and it extends to the Wolcott Reef, and it is approximately three thousand feet off-shore.

Q. About how far is it from the Sturgeon River to the Wolcott Reef?

A. Well, it is around fifteen miles.

(Testimony of Charles Turner.)

Q. And does that area embrace the mouth of the Karluk River? A. Yes, it does.

Q. And Karluk Spit? A. Yes.

Q. Does the Kadiak Fisheries procure fish for its canneries at Port Bailey from the area embraced in the Karluk Indian Reservation?

A. Yes, they do.

Q. By what method do they take that fish?

A. Purse seining and gill netting. [277]

Q. How long has the Kadiak Fisheries been procuring fish from the area now embraced in the Karluk Indian Reservation?

A. They started gill netting when they purchased the Shellikof Canning Company in 1937, and I believe they started purse seining there that same year or possibly the year before.

Q. And have they continued to fish there since?

A. Yes, they have.

The Court: Mr. Arnold, does your question go merely to the part of the Karluk Indian Reservation that was in the navigable waters or does it go to the other area?

Mr. Arnold: If the Court please, the question goes to the part that is covered by water, that being the part with which we are concerned in the fishing effort. I see, however, that for the purpose of clarity of the record that the whole matter should be covered.

Q. (By Mr. Arnold) I will ask you, Mr. Turner, if you are familiar with the upland areas embraced in the Karluk Indian Reservation?

A. Part of it, yes.

(Testimony of Charles Turner.)

Q. Do you know what upland areas are included with the Karluk Indian Reservation?

A. No. I don't know the boundaries of it. It runs back some distance, but I don't know its boundaries.

Q. Do you know whether the Karluk River is included within the boundaries? [278]

A. Oh, there must be a good deal of the Karluk River included, yes.

Q. You are not familiar with the upland boundaries of the reservation?

A. No, I am not. I could not point them out.

Q. State whether or not during, or prior to the fishing season of 1946 you had any conversation with the agents of the Fish and Wildlife Service, the Office of Indian Affairs, the natives of Karluk or other officials of the Department of the Interior relative to the enforcement of that provision, of the 1946 fisheries' regulation which prohibited fishing within the area embraced in the Karluk Indian Reservation, except by inhabitants of the reservation and persons authorized by them.

A. Yes, I have had a number of conversations with various people connected with those departments.

Q. Do you know Mr. Meyer?

A. Yes, very well.

Q. A warden for the Fish and Wildlife Service on Kodiak Island? A. Yes.

Q. Did you have any conversation with him?

A. I talked with him last spring at the time we

(Testimony of Charles Turner.)

had information as to what was incorporated in the fishery regulation.

Q. Can you fix the time and place of that conversation, approximately?

A. Very generally, it was the latter part of April or early part [279] of May in Kodiak town.

Q. What was that conversation?

A. Well, I went to see Mark about this new regulation that we had heard of that was to give him authority to make arrests in connection with the reservation and violations of the reservation, and at that time he said that he had not received the information from his office; it was purely hearsay; he had heard about it a number of times. I had a copy of the Federal Register at the cannery and offered to send it in to him. That was the only time I saw him until after the fishing started.

Q. What did he state, if anything, at that time about what the policy of the Fish and Wildlife Service would be relative to the enforcement of the regulation?

A. He wasn't very enthusiastic about it. He felt he had all he could handle with the equipment that was available there, and he thought that he would have to do it, however, as long as it was in the book.

Q. When did you next have a conversation with him about the matter?

A. Well, let's see. I didn't see Mr. Meyer until—it was this summer or fall, and I don't remember that anything more was said.

Q. Did you know Mr. Louis Mueller in his lifetime?

A. Yes, I did. [280]

(Testimony of Charles Turner.)

Q. Did you see him during the 1946 season?

A. Yes, I did.

Q. In what capacity was he acting in this matter, if you know?

A. Well, the morning I saw him, he and Mr. Brunskill were out on the dory on the fishing grounds. I believe it was the morning he was drowned.

Q. Can you fix the date of that?

A. To the best of my recollection, it was the 22nd of July.

Q. Is that the first conversation you had with Mr. Mueller during 1946?

A. Yes, that was the only time in 1946. I had seen him and talked to him in '45.

Q. What did he say at that time about the Karluk Indian Reservation?

The Court: Is this the 1945 or 1946 conversation?

Mr. Arnold: The 1946 conversation.

A. We had received the information that an injunction had been granted by this court and we were free to fish anywhere we wanted beyond the one hundred yard limit. Before we did it, we wanted to clear with him. I saw Mr. Mueller and Mr. Brunskill that morning on the dory. I was on one of the tenders. They came alongside. I asked Mr. Mueller what the setup was; at that time he said he had not received any information regarding this injunction and until he did, there would be no change in the situation, and we continued to fish the same as we had previously. [281]

**United States
Circuit Court of Appeals**

For the Ninth Circuit.

**FRANK HYNES, Regional Director, Fish and
Wildlife Service, Department of Interior,
Appellant,**

vs.

**GRIMES PACKING CO., KADIAK FISHER-
IES COMPANY, LIBBY, McNEILL AND
LIBBY, FRANK McCONAGHY & CO., INC.,
PARKS CANNING CO., INC., SAN JUAN
FISHING & PACKING CO., and UGANIK
FISHERIES, INC.,**

Appellees:

**Transcript of Record
In Two Volumes
Volume II
Pages 289 to 495**

**Upon Appeal from the District Court of the United States
for the Northern District of California,
Southern Division**

(Testimony of Charles Turner.)

Q. By "no change in the situation" do you mean that they would continue to enforce the regulation or not enforce it?

A. That is the way I understood it. In fact, we continued on that same day. He was running around in his boat, apparently patrolling the limits of the reservation.

Q. Mr. Turner, does the Kadiak Fisheries employ company fishermen in its operation?

A. Yes, they do.

Q. Do those fishermen fish in the area covered by the Karluk Indian Reservation?

A. Yes, they do.

Q. Does the Kadiak Fisheries deduct social security and withholding tax from the earnings of those company fishermen?

A. Yes, they do.

Q. For social security and withholding tax purposes, you treat the company fisheries the same as you do the other employees of the cannery?

A. Yes.

Q. That withholding tax and social security deduction includes their earnings as fishermen?

A. Yes, it does, both their pre-season work on shore and their after-season work and their fishing money on the company boats.

Q. Do you know whether Kadiak Fisheries procures employers' liability insurance on its company fishermen?

A. No, I don't. No, I don't know anything about that. [282]

Mr. Arnold: That is all.

(Testimony of Charles Turner.)

Cross Examination

By Mr. Berrett:

Q. Mr. Turner, you indicated that you live in Seattle, did you not? A. Yes, I do.

Q. Do you happen to know whether or not your company, the Kadiak Fisheries, is defendant in a suit brought in the District Court for the State of Washington involving this Karluk situation?

A. They are defendant?

Q. Yes.

A. No, sir, I hadn't heard that. I had heard they were plaintiff in this case. That is the only case I know of.

Q. You didn't know another case was pending in the State of Washington?

A. No, I didn't.

Q. You indicated that you were in this region of Karluk, or, Kodiak and Bristol Bay for a number of years, 1931 to 1937, and part of that time in the position of warden, is that correct?

A. That's right.

Q. As warden, you were familiar with all of the various canneries, during those years?

A. Yes, moderately so.

Q. And the amount of their catch? [283]

A. That's right.

Q. And the places where they caught their fish?

A. Yes, I had a pretty good review of that.

Q. You had to make a report—

A. (Interposing) That's right.

(Testimony of Charles Turner.)

Q. —isn't that right, upon that very subject?

A. Yes.

Q. To the director of the Fish and Wildlife Service at Juneau?

A. That's right.

Q. You have listened here to the depositions that have been read of the various superintendents of the plaintiff companies, have you not?

A. I have.

Q. And you recall that these companies began fishing operations in and around Kodiak Island for a number of years before they fished in Karluk?

A. Yes.

Q. Now, let me ask you this question: Where did the Kodiak Fisheries Company catch their fish prior to the season of 1938, which, according to the testimony of its superintendent, is the first year that they fished in Karluk waters, in all those preceding years you were there, from 1931 to 1937, inclusive? Where did Kodiak catch their fish?

A. Largely in Chiniak Bay.

Q. Do you know whether or not their pack of fish was as large as [284] it has been in recent years?

A. No, I wouldn't say it was quite as large. That probably ran from fifty to ninety thousand cases.

Q. And during those same years, do you know where the McConaghy Packing Company got their fish prior to the year 1937?

A. McConaghy started in 1937. He was not in operation prior to that.

(Testimony of Charles Turner.)

Q. That was his first year: 1937

A. That's right.

Q. And the Parks Canning Company, prior to the year 1941, where did they catch their fish?

A. Parks wasn't in that district prior to 1941.

Q. He was not around Kodiak Island?

A. No.

Q. Were there any other fisheries than the plaintiff fisheries operating in that area?

A. Oh, yes, there was a number of canneries not in operation at present. There was Northeastern Fisheries; they had a cannery at Uyak. And the Pacific American Fisheries had a cannery at Zacher Bay. Neither of those two canneries are in operation any more.

Q. Do you know where they were catching their fish?

A. Those were largely Karluk fish, Uyak Bay and Karluk.

Q. Do you know where the San Juan Company caught their fish before the year 1936? [285]

A. Yes. They caught their fish in Uganik Bay, and their pack was largely trap fish. They have a trap on Afognak Island, and the rest are around Uganik Bay.

Q. Do you know whether they still fish those areas? A. Oh, yes.

Q. Do you know where the Uganik Company caught their fish prior to 1936?

A. They have a trap on Raspberry Island, and two on Uganik Bay. That is where the largest part

(Testimony of Charles Turner.)

of their pack came from, although Uganik operated the seine boats in Karluk, I believe, from the time it was opened for purse seining, they were there in the first year; that is, in 1934.

Q. You heard the testimony that they started there in 1936, did you not?

A. I think an examination of the Bureau of Fisheries' records will show that their boats were there the first year.

Q. What do you mean by "the first year"?

A. In 1934, when purse seining was opened.

Q. Was there any fishing done to any extent by these plaintiff companies before 1934 in the region of Karluk?

A. You couldn't fish there at all. That was only open to beach seines. The ground was all owned there by the Alaska Packers. It wasn't open to other companies.

Q. In regard to Libby, McNeill & Libby, prior to—I think we need not ask that because they entered in 1946. As a matter [286] of fact, then, these various fishery companies and others were in operation and securing fish for their packs in waters other than Karluk waters for many years?

A. Yes, that is true.

Q. And those waters are still available to these various companies?

A. Some of them are and some are not.

Q. What do you mean by some of them are not available?

A. Well, you take Chiniak Bay that I spoke of,

(Testimony of Charles Turner.)

the place, the bay, where Kadiak Fisheries took their majority of their pack, was closed by the Navy when they put their base close by. The most productive part of that area has not been reopened.

Q. Which of the canneries would be most affected by that? A. McConaghy and Kadiak.

Q. You indicated that you had had a conversation with Mark Meyer early in May. At that time had Mr. Meyer received any instructions from his department to enforce the regulation known as Section 208.23 R?

A. I suppose you are referring to the Karluk—

Q. Yes, I am.

A. No, he hadn't. He hadn't received the wording of the regulations; he hadn't received instructions about it, or anything else.

Q. So at that time he didn't know what the policy— [287]

A. (Interposing) That's right.

Q. —of the Fish and Wildlife Service would be?

A. Yes.

Q. He didn't know whether they would want him to enforce it or not? A. That's right.

Q. All he could give you at that time was his own personal opinion? A. That's all, yes.

Q. You indicated that you had a conversation with Mr. Mueller on July 22, 1946?

A. That's right.

Q. Off Karluk? A. Yes.

Q. If I understood you correctly, you said that on that occasion of your meeting him you asked him if he had heard anything?

(Testimony of Charles Turner.)

A. I forget. The purpose of my stopping and talking to him was to find out if there was any change in the situation. I wouldn't attempt to quote what he said or what I said, but that was the purpose of stopping and talking.

Q. At that time had you received word—

A. (Interposing) Yes.

Q. —that an injunction had been issued ?

A. There was a piece in the Kodiak paper about it, and, to verify it, we wired our Seattle office and they informed us that it had been granted. [288]

Q. At that time, Mr. Turner, were Mr. Mueller and Mr. Brunskill making any arrests?

A. No. I hadn't heard of any.

Q. Had you heard of them making any?

A. No, I never had.

Q. Didn't you know, as a matter of fact, that they had orders not to make arrests?

A. No, I was never told that.

Q. When Mr. Mueller indicated to you that there was no change in the situation, did you understand by that that he would make arrests?

A. Well, it was difficult to say. This thing has been kind of a hard one to figure out. All the way through, there has been an air of arrest hanging over everyone there if you made a false move around the place, although nothing has ever happened, although a couple of years ago, a couple of our boys had to turn some of the fish loose. We had that straightened out later, although they lost the fish.

Q. You said you knew of no arrests being made?

A. Yes.

(Testimony of Charles Turner.)

Q. If that situation was not to be changed, that would mean no arrests were to be made?

A. I had heard of no violations down there.

Q. You didn't consider that a threat to the operation of the fisheries in that area, did you? [289]

A. It put us in the position of not being able to catch a lot of fish we would have otherwise.

Q. Did you as a result of that conversation tell your men to be careful?

A. Some of the boats came over after I had talked to Mueller and Mr. Brunskill to find out if they could go in, and I told them just what Mr. Mueller had said, although none of them went in although there were fish in that area later in the day.

Q. Weren't your folks already inside of the reservation waters?

A. Inside of the reservation waters, but not inside of the buoys.

Q. You mean at the mouth of the river?

A. Yes, they were in the area between the Sturgeon River and Wolcott Reef.

Q. That is, they were fishing within the reservation?

A. They were.

Q. And had been all during the season?

A. Yes, they were.

Q. Yet they hadn't been arrested?

A. They had permits to fish in that area, a good many of them. They paid money for that.

Mr. Berrett: That is all.

(Testimony of Charles Turner.)

Redirect Examination

By Mr. Arnold:

Q. Now, Mr. Turner, you say that no arrests were made but that there was a continual air of threatened arrest. Now, where [290] was it that Mr. Mueller was attempting to restrict the operation of your boats? Was it within the entire reservation or within a smaller area where markers had been established by the Office of Indian Affairs?

A. As we understood the thing there, the boys who got permits were permitted to fish in the area between Wolcott Reef and Sturgeon River, except a limited area around the mouth of the River. I believe it was one thousand yards on one side and five hundred on the other and it must have been probably one thousand yards off-shore. I wouldn't be sure of those distances.

Q. What that area marked off?

A. Yes. There was a sign on the beach on each end of it, "Fishing Limits," and then there was a buoy directly out from that on each end.

Q. What that the area that Mr. Mueller was patrolling?

A. That is where he seemed to be most of the time, Mr. Brunskill too. They were around there in the boat.

Q. Now, when you spoke of the conversation with your boats after you talked with Mr. Mueller and Mr. Brunskill, you stated that the boats did not go in, although there was fish there. Now, what do you mean by going in: inside of the reservation or inside of this zone marked off at the mouth of the Karluk River?

(Testimony of Charles Turner.)

A. I mean inside of the zone marked off by the buoys. [291]

Q. It was your understanding and the understanding of the fishermen, if they had permits, they could fish throughout the area of the Karluk Reservation except within the inner zone?

A. That's right.

Q. Where were the fish?

A. That day they happened to be inside those markers.

Mr. Arnold: That is all.

Recross Examination

By Mr. Berrett:

Q. How were Mr. Mueller and Mr. Brunskill keeping any fishermen from going within the markers?

A. Their presence there, I think, had more effect than anything on them.

Q. They weren't using any force?

A. I never saw them use any, no, although each of them had a gun on his hip.

Q. Mr. Turner, do you know whether this is the area, this inner area you are speaking of, that Mr. Meyers had in mind that he needed to enforce if he followed the regulation?

A. Well, I couldn't say as to that. We didn't go into that.

Q. Are you acquainted with the fisheries regulations for 1946?

A. Yes, quite well.

(Testimony of Charles Turner.)

Q. Is there anything said in regard to this little inner area? A. Yes, there is.

Q. Would you read it to me? [292]

A. I think you will have to get me the amendment. There is an amendment to this.

Q. Do you know when the amendment was issued? A. August 29.

Q. What date were you there, Mr. Turner?

A. Fishing?

Q. No. What date did this conversation take place? A. That was early in May.

Q. There was no amendment then?

A. Oh, no. That is something since then.

Q. This date, on the 22nd of July, when you said you were conversing with Mr. Muir, [Mueller] was there an amendment then? A. No.

Q. In other words, there is nothing here in the regulation at that time that the Fish and Wildlife Service were obliged to enforce that had to do with that inner area; is that correct?

A. Nothing that had to do with the inner area, but certainly there is something here regarding the whole area.

Q. What are the boundaries of that? Will you read them?

A. Beginning on the easterly, the east, shore of Shelikof Strait, on Kodiak Island, $57^{\circ}31'30''$ North; thence northeasterly along the said shore to a point $57^{\circ}39'40''$.

Q. Is that a description of the area within the buoys? A. I can't tell you that.

(Testimony of Charles Turner.)

Q. I will show you what is marked as Plaintiffs' Exhibit Q, being [293] a purported map of the Karluk River area. Can you point out on here what was included in that regulation?

A. It would be right here, I would say.

Q. I would like you to mark on this map, Mr. Turner, the area of ocean water from which fishing is restricted by the fisheries' regulations of 1946.

A. All right. It begins at this point here.

Mr. Berrett: If the Court will indulge us for a moment, we would like to set forth on this map the boundaries that we are talking about.

Mr. Arnold: If the Court please, for general information and perhaps for use in cross-examining this witness, I would like to have this map introduced in evidence. We are glad to offer it as an exhibit.

Mr. Berrett: I have no objection to it. I would like very much to have it in evidence.

The Court: Very well, it may be admitted.

(The map above referred to was marked by the Clerk of the Court as Plaintiffs' Exhibit R.)

Q. (By Mr. Berrett): Now, Mr. Turner, on this larger map, the Cannery Map of Alaska, marked as Plaintiffs' Exhibit R, will you indicate the area from which fishing is prohibited by the fisheries' regulations for 1946?

A. Do you want me to read the whole thing, or just—

Q. (Interposing): You have already read it. Now, if you can, [294] point to that map and show us that spot, please.

(Testimony of Charles Turner.)

A. I assume that is Cape Karluk there. This mouth of the Sturgeon River would be . . . oh, it is possibly three miles west of Cape Karluk, which would put it about there, and that extends to Wolcott Reef. That is Rocky Point. That would be right here. (The witness indicated the points referred to on Plaintiffs' Exhibit R.)

Q. And it extends out into the ocean three thousand feet to mean low tide? A. Yes.

Q. Now, Mr. Turner, when you were in this area of Karluk on July 22, 1946, were the boats of the plaintiffs fishing within that area?

A. Oh, yes.

Q. In considerable numbers?

A. Oh, roughly, sixty boats.

Q. Now, is there any other area mentioned in the regulation? A. In what respect?

Q. In any respect.

A. In this particular regulation?

Q. Yes.

A. Well, it goes on and says, "The foregoing prohibition shall not apply to fishing by natives in possession of said reservation, nor to fishing by other persons under authority granted by said natives."

Q. But that didn't apply to any smaller area on the map, this smaller area you refer to. What is that, do you know—this small limited area around on both sides of the beach, you said for five hundred yards on the improvement side and one thousand yards on the spit side? A. Yes.

Q. What is that?

(Testimony of Charles Turner.)

A. That is the area around the mouth of the river.

Q. Why was there any effort, Mr. Turner, to keep any fishermen out of that area, if you know?

A. Well, it is no doubt used for the exclusive use of beach seines.

Q. But not by the regulations?

A. Not at present. At the time that was published, no.

Redirect Examination

By Mr. Arnold:

Q. After this conversation with Mr. Mueller, was the fact of the issuance of the injunction by this Court established at Karluk, become known?

A. Yes, I believe it was. As our boats came around, we told them what we knew about it, and our Seattle office had advised us that the injunction had been issued, and I believe the other companies did the same thing.

Q. And after that word was passed, did the boats fish within the inner zone? [296]

A. I believe it was that afternoon they started going in, yes. It was either that afternoon or the next day.

Q. Well, then, isn't it a fact, Mr. Turner, that prior to the issuance of the injunction by this Court and the publication of that fact at Karluk, that due to the activities of the Fish and Wildlife Service and Mr. Muir [Mueller] and Mr. Brumskill that the boats did not fish within the inner zone?

A. That's right, yes.

Mr. Arnold: That is all.

(Testimony of Charles Turner.)

Recross Examination

By Mr. Berrett:

Q. Mr. Turner, would you say it was due to their activities that they didn't fish within it?

A. Yes, I would. It was the fact that they were there, and it was generally regarded that they were there to enforce the law, and they believed the law was to keep them out; and I might add also that when some of our boats went in to get their permits they were told that they could be logged for entering the areas other years, and I think they were given some instructions to keep out of there before the permit was issued.

Q. Mr. Turner, did you ever instruct your men to keep out of the area? A. Yes.

Q. When did you do that? [297].

A. In 1944, I believe it was, when the area first opened, and then again last spring.

Q. Why did you instruct them to keep out of that inner area last spring?

A. Because we didn't want any of them arrested.

Q. Weren't you told that that was an agreement with the Department of the Interior that you would not interfere with—

A. (Interposing): No.

Q. —the beach seining until this question was settled? A. No, I was never told that.

Mr. Berrett: That is all.

(Testimony of Gordon Jones.)

Redirect Examination

By Mr. Arnold:

Q. Mr. Turner, did you say that Mr. Brunskill and Mr. Mueller were armed?

A. They each had a gun, yes.

Q. Were their weapons visible?

A. Yes, on their hip.

Q. Well, explain that. They carried what kind of arms and how?

A. A revolver. I think it was strapped on the outside.

Q. In a holster? A. I believe so.

Mr. Arnold: That is all.

Recross Examination

By Mr. Berrett: [298]

Q. Mr. Turner, isn't it the usual thing for officers in that capacity to carry a pistol?

A. I suppose it is.

Q. Did you, when you were warden, carry one?

A. No, I never did; never guns.

Q. But it is usual for them to do so?

A. Not for Bureau of Fisheries men, it certainly wasn't, in that capacity.

Q. But for enforcement officers it is usual, isn't it?

A. It is customary for a United States Marshal to, I believe.

Mr. Berrett: That is all.

Redirect Examination

By Mr. Arnold:

Q. Is it customary for United States Marshals to carry guns in an open holster?

A. That is not very often you see them on the outside, I don't believe.

(Witness excused.)

(Five-minute recess.) [299]

Mr. Arnold: We will call Mr. Jones, if the Court please.

GORDON JONES,

a witness on behalf of the plaintiffs, having been first duly sworn by the Clerk of the Court, was examined and testified as follows:

Direct Examination

By Mr. Arnold:

Q. State your name. A. Gordon Jones.

Q. What is your occupation?

A. Cannery superintendent.

Q. By whom are you employed?

A. By the Alaska Packers Association at Larson's Bay, Kodiak Island, Alaska.

Q. How long have you been in the employ of the Alaska Packers Association?

A. Forty-seven years.

Q. During that time, during the period of your employment by the Alaska Packers Association, have you been working for them in connection with

(Testimony of Gordon Jones.)

the operation of salmon canneries in the Territory of Alaska? A. Yes.

Q. Where is the Alaska Packers Association cannery, the Larson's Bay cannery, of which you are superintendent located with [300] reference to Karluk River?

A. Well, it is about thirty miles from the Karluk River, and it is situated in a little tributary bay of Uyak Bay.

Q. When were you first at Karluk River?

A. In 1902.

Q. Were you employed then by the Alaska Packers Association? A. Yes.

Q. How long have you been superintendent of the Larson's Bay cannery?

A. Twenty-four years.

Q. When was the Larson's Bay cannery of the Alaska Packers Association built, if you know?

A. 1909.

Q. Did the Alaska Packers Association operate canneries on Kodiak Island prior to the construction of the Larson's Bay cannery in 1909?

A. Yes.

Q. When did they commence the operation of canneries on Kodiak Island

A. 1904 . . . No, 1894.

Q. 1894? A. Yes.

Q. Where were those plants located?

A. At the mouth of Karluk River, and they had other canneries in other districts on Kodiak Island.

(Testimony of Gordon Jones.)

Q. Are you familiar with the area embraced in the Karluk Indian Reservation? A. Yes.

Q. State roughly what area of the ocean waters is contained within the Karluk Indian Reservation.

A. Yes. Three thousand feet off-shore, from Sturgeon River to Wolcott Reef.

Q. You are familiar with those waters, are you, Mr. Jones? A. Yes.

Q. How long, to your knowledge, have white fishermen been taking fish within those waters?

A. Well, since 1882 to 1939.

Q. That is, white fishermen of the Alaska Packers Association?

A. No. In the early history they had a company there by the name of the Russian-American Trading and Packing Company. That was prior to the formation of the Alaska Packers Association.

Q. When was the Alaska Packers Association formed? A. 1894.

Q. What properties did the Alaska Packers Association acquire at Karluk when they formed in 1894?

A. Well, they acquired the entire west spit and quite a lot of acreage on the improvement side, and that is the southern end, southern side of the River.

Q. Well, isn't it a fact, Mr. Jones, that since 1882 the Alaska [302] Packers Association and their predecessors have taken fish within the area now embraced in the Karluk Indian Reservation?

A. Yes.

Q. By means of white fishermen? A. Yes.

(Testimony of Gordon Jones.)

Q. Does the—is the Alaska Packers Association engaged in fishing activities within the Karluk Indian Reservation at the present time?

A. Yes.

Q. Did they operate there during the season of 1946?

A. Yes.

Q. Was that operation conducted under your supervision?

A. Yes.

Q. Will you describe briefly the facilities maintained by the Alaska Packers Association at Karluk within the boundaries of the Karluk Indian Reservation and of the fishing operations that you conducted there in 1946 and previous years?

A. You mean the method of fishing?

Q. The method of fishing and the facilities that you use.

A. Well, to begin with, we furnish all the living quarters for the fishermen, and we furnish all the culinary equipment, including the fuel; and we furnish all the fishing gear and floating equipment. Does that answer your question?

Q. How are the fishermen paid?

A. Why, they are paid by the fish according to the union scale. [303]

Q. Is that at the company gear price or the independent price?

A. That is the company gear price.

Q. Did you deduct from their earnings for social security taxes and withholding taxes?

A. Yes.

Q. From their earnings as fishermen?

A. Yes.

(Testimony of Gordon Jones.)

Q. Who are these fishermen?

A. They are all residents of Karluk village.

Q. Alaska natives?

A. Well, with the exception of some of the key men, like the fishing boss we furnish and we pay his salary.

Q. And the other people, are they native inhabitants of the Karluk Indian Reservation?

A. Yes, with the exception, I think, of one.

Q. One exception? A. Yes.

Q. Who is that?

A. Why, he is a missionary there.

Q. You stated that you fished there with white fishermen until 1939? A. Yes, sir.

Q. State how that operation was conducted when you used white fishermen.

A. Well, in the early days, we used to use about four gangs. [304] In other words, we used to run two shifts on each side of the river, about eighty men on each side of the river for the beach seine work.

Q. Did you use native crews during those years also? A. Oh, yes.

Q. Both native and white men? A. Yes.

Q. Mr. Jones, what shore facilities, what camps, or equipment or machinery does the Alaska Packers Association maintain at Karluk?

A. Well, to begin with, they have their radio-telephone station there, and then they have their machinery, like winches for hauling the seines, and they have four launches to set out the seines; they have the electric light plant, cold storage.

(Testimony of Gordon Jones.)

Q. Do they have mess houses and bunk houses?

A. Mess houses and bunk houses, yes.

Q. Web lofts?

A. Web lofts, yes. And then they have their boat shop where they do all their boat work, carpenter shop.

Q. Does the Alaska Packers Association operate a store or commissary there? A. Yes.

Q. Is that in operation the year round?

A. All the year round, yes.

Q. What other commercial facilities are there at Karluk besides [305] the Alaska Packers Association store? A. None.

Q. There are none? A. No.

Q. These facilities and buildings that you describe, are they located on public domain or upon the private property of the Alaska Packers Association?

A. No. They are on patented property.

Q. On patented property? A. Yes.

Q. About how much patented property does the Alaska Packers Association have at Karluk, if you know?

A. Oh, it goes into the thousands of acres.

Q. How about Karluk spit itself?

A. That is all patented, the entire spit.

Q. And owned by the Alaska Packers Association? A. Yes, sir.

Q. Does the waters adjoining this patented property of the Alaska Packers Association, the waters off the beach, are they included within the

(Testimony of Gordon Jones.)

boundaries of the Karluk Indian Reservation, the open waters?

A. No. It was always my understanding that there was no ownership below high water mark.

Q. Are they included within the boundaries of the Karluk Indian Reservation? [306]

A. Oh, yes. Yes.

Q. Does the Alaska Packers Association rent any of its buildings to the Department of the Interior or the Office of Indian Affairs?

A. Yes.

Q. What buildings?

A. The school building and living quarters for the teachers.

Q. Those buildings are the property of the Alaska Packers Association? A. Yes, sir.

Q. Located on patented ground? A. Yes.

Mr. Arnold: That is all.

Cross Examination

By Mr. Berrett:

Q. Mr. Jones, what part of the Karluk area is the school reserve?

A. Well, it is on the, I would say on the east bank of the river, about one thousand yards from the mouth of the river, upside.

Q. It doesn't include any of the patented lands held by your company?

A. The property that school building is on?

Q. Well, what is known as the school reserve,

(Testimony of Gordon Jones.)

which was withdrawn for that purpose some years ago, does that include any of the lands that were held prior to that time by your company? [307]

A. I don't quite understand.

Q. The school reserve which was designated at Karluk, I think in the year 1936, did it include any of the lands that had, prior to that time, belonged to the Alaska Packers Association?

A. Oh, no.

Mr. Arnold: Now, if the Court please, I object to the question and move to strike the answer, unless it be made apparent that the witness knows of the school reserve and its location.

The Court: Objection sustained. It may be stricken.

Q. (By Mr. Berrett): Mr. Jones, do you know if any part of this area has been reserved as a school reserve?

A. I understand there has been a plot of land there reserved.

Q. Do you know where it is located?

A. Yes, sir.

Q. Where is that?

A. It is on top of the hill a very short distance from the church. That is as near as I could describe it.

Q. Do you know how many acres are in the reserve?

A. I think it is a very small portion; probably two-thirds of an acre, if I remember correctly.

(Testimony of Gordon Jones.)

Q. But you don't know exactly? A. No.

Q. Mr. Jones, does the fishermen's union dictate to your company the hours that these fishermen shall fish for you? [308] A. No.

Q. Or the nature of their living quarters?

A. Yes.

Q. They do dictate as to living quarters?

A. Yes. They don't dictate, but they suggest.

Q. They suggest. But they have nothing to do with the hours? A. No.

Q. That your fishermen fish? A. No.

Q. Do you know in case of injury to any of the fishermen while fishing that the fisherman comes under the Jones Act? A. Yes.

Q. Mr. Jones, did you provide tender service—

A. Yes.

Q. —for these fishermen? A. Yes.

Q. How do you pay the men who work on the tenders? A. The regular union scale.

Q. They are contract employees, are they not?

A. Oh, yes.

Mr. Arend: Your Honor, we move at this time to strike the testimony, all the testimony given on direct examination by this witness. It appears that there is an attempt here being made to show that the Alaska cannery employ their fishermen under the same terms and conditions as the plaintiffs in this case. The plaintiffs have not told us whether or not their men are employees. It would appear that their fishermen are not employees while they

(Testimony of Gordon Jones.)

are fishing. They are trying to show by this witness that there is the identical setup between the plaintiffs and their fishermen who are fishing, and the Alaska Packers Association and the men who fish for them, and I feel that they have failed to do that and that all of this testimony is irrelevant in this case.

Mr. Arnold: If the Court please, I am not quite sure I understand the motion. I think it is untimely and inappropriate. If the direct examination was considered, irrelevant and incompetent, objection should have been made at that time. Now, as to the statement he made that "the plaintiffs have not told us whether the fishermen are employees or not," a relationship of employer and employee is a legal relationship and is not to be determined at the option of witnesses in this lawsuit. The answer to the question is to draw the legal conclusion. Now, if that question is involved in this litigation—I don't see that it is—if it is one of the legal phases of the case, it is to be decided by the court and not by the witnesses. We are attempting to show by this witness and others the circumstances under which we fish and operate in that area. The counsel for the defendants have examined this witness and others on cross-examination in an effort to develop the fact or facts upon which the argument can be made that [310] the fishermen are not employees. Why I do not know, because I do not consider that would be relevant to this con-

(Testimony of Gordon Jones.)

trovery. We have asked this witness certain facts relative to the relationship and the type of operation. We think it is material and competent to show the circumstances under which our fishermen fish there and the circumstances under which the inhabitants of the reservation fish; and that is the purpose of the testimony, and we think it is properly admissible.

Mr. Arend: Your Honor, the Complaint sets forth that there is a threat of arrest. The threat of arrest would only be aimed at the man who is fishing. Now, if he is an employee of the company, then, of course, the plaintiff is concerned, but, if he is not an employee of the plaintiff, he is a contract fisherman, and the plaintiffs, under those circumstances, will not have a cause of action here at this time.

The Court: Motion denied.

Mr. Medley: Do you wish to ask this witness any further questions?

Mr. Berrett: That is all.

Mr. Arnold: That is all.

(Witness excused.)

Mr. Medley: If the Court please, I wish to call to your attention the fact that when the depositions were taken the exhibits were numbered and reference was made all through the depositions to the numbers of the exhibits in the examination [311] of the various witnesses. With the consent of the attorneys for the defendant, we would like to have

the record show that the numbers of the exhibits in the deposition have been changed as follows:

Plaintiffs' Exhibit 1 is now Plaintiffs' Exhibit A;
Plaintiffs' Exhibit 2 is now Plaintiffs' Exhibit Q;
Plaintiffs' Exhibit 3 is now Plaintiffs' Exhibit B;
Plaintiff's Exhibit 4 is now Plaintiffs' Exhibit C;
Plaintiffs' Exhibit 5 is now Plaintiffs' Exhibit D;
Plaintiffs' Exhibit 6 is now Plaintiffs' Exhibit E;
Plaintiffs' Exhibit 7 is now Plaintiffs' Exhibit F;
Plaintiffs' Exhibit 8 is now Plaintiffs' Exhibit G;
Plaintiffs' Exhibit 9 is now Plaintiffs' Exhibit H;
Plaintiffs' Exhibit 9A is now Plaintiffs' Exhibit H-1;

Plaintiffs' Exhibit 9B is now Plaintiffs' Exhibit H-2;

Plaintiffs' Exhibit 11 is now Plaintiffs' Exhibit I;

Plaintiffs' Exhibit 12 is now Plaintiffs' Exhibit J;

Plaintiffs' Exhibit 13 is now Plaintiffs' Exhibit K;

Plaintiffs' Exhibit 14 is now Plaintiffs' Exhibit L;

Plaintiffs' Exhibit 15 is now Plaintiffs' Exhibit M;

Plaintiffs' Exhibit 16 is now Plaintiffs' Exhibit N;

Plaintiffs' Exhibit 17 is now Plaintiffs' Exhibit O;

Plaintiffs' Exhibit 18 is now Plaintiffs' Exhibit P.

Mr. Berrett: We are ready to stipulate to that change.

The Court: Very well. Are you ready to proceed, Mr. Berrett? [312]

Mr. Berrett: We are.

The Court: Very well.

Mr. Berrett: We will call Mr. Hynes.

FRANK W. HYNES,

a witness on behalf of the defendant, having been first duly sworn by the clerk of the court, was examined and testified as follows:

Direct Examination

By Mr. Berrett:

Q. Will you state your full name?

A. Frank W. Hynes, Regional Director—

Q. Where do you reside?

A. —of the Fish and Wildlife Service.

Q. Where do you reside

A. Juneau, Alaska.

Q. What is your occupation?

A. Regional Director, Fish and Wildlife Service.

Q. Are you familiar with the fisheries' regulations of Alaska? A. Quite familiar.

Q. Did any correspondence with the Department of the Interior, regarding the enforcement of the fisheries' regulations, come through your office?

A. Yes.

Q. Are you acquainted with the laws and regulations for the protection of commercial fisheries of Alaska for 1944, 1945 and 1946? [313]

(Testimony of Frank W. Hynes.)

A. I think so.

Mr. Berrett: Will you mark these as Defendant's Identifications A to C?

(The laws and regulations for the protection of the Commercial Fisheries of Alaska for the years 1944, 1945, and 1946, were marked as Defendant's Identifications A, B, and C., respectively, by the Clerk of the Court.)

Mr. Arnold: We have no objection to those going into the evidence.

Mr. Berrett: At this time, your Honor, I would like to introduce into evidence and marked as Defendant's Exhibits, Defendant's Identifications A, B, and C, being the compilation of the laws and regulations for the protection of the commercial fisheries of Alaska, A for the year 1944, B for the year 1945, and C for the year 1946.

Mr. Arnold: No objection.

The Court: They may be admitted.

(Thereupon Defendant's Identifications A, B, and C were marked by the Clerk of the Court as Defendant's Exhibits 1, 2, and 3, respectively.)

Q. (By Mr. Berrett): Prior to 1946, Mr. Hynes, did the laws and regulations governing the commercial fisheries of Alaska contain any provisions in respect to fishing in the ocean waters in the Karluk area?

A. Only the one hundred yard area of the mouth of the area.

(Testimony of Frank W. Hynes.)

Q. What was the purpose of that restriction?

A. That was for conservation purposes. [314]

Q. Is that common with restrictions at the mouth of other rivers?

A. Well, there is a little difference in the size of the area.

Q. Is it common practice to prohibit fishing in the very mouth of rivers that empty into ocean waters?

A. It is.

Q. How large an area is prohibited at the mouth of the Karluk River?

A. One hundred yards.

Q. For how many years has that prohibition been in effect, do you know?

A. I could not say exactly.

Q. Was it in effect in 1944?

A. Yes.

Q. In 1945?

A. Yes.

Q. And this year, 1946?

A. Well, it is still in effect, yes.

Q. Prior to 1946, did any of the regulations prohibit fishing in the ocean waters one thousand feet off-shore, extending along the coast on either side of the Karluk, for a distance of some fifteen miles, corresponding to the shore line of the reserve? Was there any prohibition to fishing other than the one you have designated at the mouth of the river?

A. There was not. [315]

Q. Is there a fisheries' regulation concerning that area now?

A. There is.

Q. When was it issued?

A. March 22, 1946, I believe.

(Testimony of Frank W. Hynes.)

Q. I show you what is marked as Defendant's Exhibit 1, being the laws and regulations for the protection of the commercial fisheries of Alaska, 1944. In these regulations, was there any prohibition of fishing in these waters of the region of Karluk except at the mouth of the river?

A. There was not.

Q. I show you what is marked as Defendant's Exhibit 2, being the laws and regulations for the protection of commercial fisheries of Alaska in 1945, and I ask you if there is contained in this regulation any prohibition to commercial fishing in the waters off the Karluk Reserve, save at the mouth of the river as you have indicated?

A. There was not.

Q. I show you what is marked as Defendant's Exhibit 3, being the laws and regulations for the protection of the commercial fisheries of Alaska in 1946 and ask you to read the regulation in regard to fishing off the Karluk Reservation.

A. (r) under section 208.23: "All waters within 3,000 feet of the shores of Karluk Reservation (Public Land Order No. 128, May 22, 1943), beginning at a point on the east shore of Shelikof Strait, on Kodiak Island, latitude $57^{\circ} 32' 30''$ N., [316] thence northeasterly along said shore to a point $57^{\circ} 39' 40''$.

"The foregoing prohibition shall not apply to fishing by natives in possession of said reservation, nor to fishing by other persons under authority granted by said natives."

(Testimony of Frank W. Hydes.)

Q. Is this the fisheries' regulation prohibiting fishing in those waters off the reservation that you have had any duty to enforce?

A. That is correct.

Q. Did you or any of your agents, men working in cooperation with you in your department, have anything to do with setting up the Karluk Indian Reservation?

A. We did not.

Q. Did you or any of your agents have anything to do with the passing of ordinances by the native council regulating fishing in reservation waters?

A. We did not.

Q. Did you or your agents, prior to March 22, 1946, have any duty to enforce those ordinances of the Indian council at Karluk pertaining to fishing off the reservation?

A. No.

Q. Did you or any of the agents interfere with fishing by any of the plaintiffs in this action or their fishermen?

Mr. Arnold: Now, if the Court please, I object to that. First, it fixes no time; second, upon the ground that it calls for a conclusion, and that it is irrelevant. This witness has [317] testified that he is the Regional Director of the Fish and Wildlife Service, charged with the duty of carrying out the provisions of the fishery regulations, the regulations of the commercial fisheries of Alaska. The question of whether or not he interfered with the fishing operations of the plaintiffs I contend will be incompetent. His duty is to enforce the regulations, to apprehend violators. He has no authority to

(Testimony of Frank W. Hynes.)

waive the regulation, nor the enforcement of it, and no authority to interfere or not interfere with people who are legally fishing.

Mr. Berrett: Your Honor, I don't know how counsel can object to a question before the question is stated. I got half-way through with it, and, if the entire question had been stated, I think there would have been no objection.

Mr. Arnold: Then I apologize and withdraw the objection.

Mr. Berrett: I would like to state it in full and let counsel object if he cares to then.

Q. (By Mr. Berrett): Did you or any of your agents interfere with the fishing by any of the plaintiffs or their fishermen prior to the year 1946, in the ocean waters that have been included in the reserve at Karluk?

Mr. Arnold: Your Honor, I renew the objection.

The Court: Objection overruled.

A. We did not.

Q. Did you threaten to do so? [318]

A. No.

Q. Have you ever been ordered by the Department of the Interior to enforce the fishing regulations of the village of Karluk prior to 1946?

A. No.

Q. May I ask this: When did you first enter into the picture of prohibiting fishing in the waters of the Karluk Indian Reservation, other than your usual fishing regulations for all the fisheries?

(Testimony of Frank W. Hynes.)

A. When this regulation was published in the Federal Register.

Q. And that would be March 22nd of this year?

A. That was the first notice we had of it.

Q. Your enforcement duty, then, would be a result solely of the fisheries' regulation prohibiting fishing in an area that happens to correspond with the reserved waters of the Karluk Indian Reservation?

A. That is correct.

Q. When the Alaska commercial fisheries' regulations for 1946 were issued on March 22nd of this year, did some question arise in your department as to the legality of a portion of section 208.23(r)?

A. Yes.

Mr. Arnold: If the Court please, I object to that as immaterial.

The Court: I don't see the purpose of it. What is it? [319]

Mr. Berrett: The purpose is this, because some question did arise, certain correspondence was entered into between the office of Mr. Hynes and the Department of the Interior and the plaintiffs in this action that I wish to introduce into this court as being pertinent in this case.

Mr. Arnold: If the Court please, I fail to see the pertinence of any departmental correspondence, or any correspondence, if there were any, between the Department and the defendant and the plaintiffs relative to the legality of it. That is the purpose of this lawsuit, to determine the legality, and an exchange of correspondence or views on the matter

(Testimony of Frank W. Hynes.)

would not be relevant, as I see it. The Department apparently didn't see fit to withdraw the regulation; it is still in effect, and it is one of the regulations for the protection of the commercial fisheries of Alaska, and discussions had with the Department as to its validity, I think, are immaterial and irrelevant and I renew the objection.

Mr. Berrett: Your Honor, may I say this further: The plaintiffs have already, in the testimony of their witnesses introduced by deposition and otherwise, referred to correspondence in the way of telegrams having to do with the enforcement of this regulation. In fact, without that correspondence to which they refer, they would probably have no threat of enforcement at all, except the technical threat that when the regulation is passed, it ought to be enforced. It seems we [320] are coming down to that. That is the only threat in this case. The plaintiff introduced evidence pertaining to a telegram which is a part of this correspondence. It is in this case as their Exhibit D, purporting to be a telegram from this witness, Mr. Hynes, to Mr. Meyers, who is an agent on Kodiak Island. That is already in evidence. It was introduced by the plaintiffs themselves, so this matter of correspondence having to do with whether or not this regulation would or would not be enforced, they have already brought into the record. Now they object on the grounds that any correspondence has no effect on whether they are going to enforce it or not. This becomes, your Honor, the very crux of the matter.

(Testimony of Frank W. Hynes.)

These plaintiffs have no right in this court, they have no right to an injunction, unless they can establish in this court of equity that there has been some danger to their property; that they are liable to have their property seized, or their men arrested, or their fishery operations interfered with. It is our contention that they have never been in any danger of that whatsoever, due to the fact that they themselves sought a friendly suit, as we wish to show by this evidence, and the only threat they have introduced was a part of the very arrangement peaceably made by Mr. Arnold with the solicitor of the Department of the Interior for such a suit and for such a threat as we can show. We feel it is our right to introduce this question and these exhibits to explain [321] Exhibit 4 of the plaintiffs.

The Court: The objection is sustained.

Q. (By Mr. Berrett): Mr. Hynes, do you know whether there was any effort made to arrange for a test case of this law, this regulation?

Mr. Arnold: I object on the ground it is irrelevant, incompetent, and immaterial for the reasons previously stated.

The Court: Objection sustained.

Mr. Berrett: I would like to have this marked for identification.

(A copy of a telegram from Frank W. Hynes to Mark Meyer, dated May 25, 1946, was marked Defendant's Identification D by the Clerk of the Court.)

(Testimony of Frank W. Hynes.)

Q. (By Mr. Berrett): Mr. Hynes, did you, on May 25, 1946, send a telegram to Mark Meyer, your agent at Kodiak, in regard to the enforcement of fisheries' regulation 208.23(r)? A. I did.

Q. I will read to you what purports to be a telegram and ask you if this is the one that you sent to Mark Meyer, Fish and Wildlife Service, Kodiak, Alaska, from Frank W. Hynes, Fish and Wildlife Service, Juneau, Alaska, May 25, 1946:

"In order clarify Regulation 208.23R which prohibits fishing in waters Kodiak Reservation except by natives in possession thereof and persons authorized by said natives you are directed to arrange for test case on first day season opens pd Packers have declared intention to fish in reservation [322] contrary to provisions of regulations & therefore will welcome early court decision pd Discuss matter with U S Attorney and Commissioner and advise course of action you propose to take

Frank W. Hynes

Regional Director

"Fish and Wildlife Service"

Is that the telegram that you sent?

A. It is.

Mr. Berrett: At this time, your Honor, I would like to introduce into evidence Plaintiffs—Defendant's Identification D.

Mr. Arnold: No objection.

The Court: Isn't it already in evidence?

Mr. Berrett: In a different form, your Honor,

(Testimony of Frank W. Hynes.)

That is included in a larger telegram which is in evidence.

The Court: Very well, it may be admitted.

(Thereupon Defendant's Identification No. D was marked as Defendant's Exhibit 4 by the clerk of the court.)

Mr. Berrett: Will you mark this as Defendant's Identification E?

(Copy of telegram from Ward T. Bower to Thompson, dated May 28, 1946, was marked by the clerk of the court as Defendant's Identification E.)

Q. (By Mr. Berrett) Mr. Hynes, would you tell me who Mr. Thompson of the Fish and Wildlife Service is?

A. Mr. Seaton Thompson is Assistant Chief of the Division of [323] Alaska Fisheries with headquarters in Chicago.

Q. Is he your immediate superior?

A. He is.

Q. And who is Mr. Ward T. Bower?

A. Mr. Bower is the Chief of the Division of Alaska Fisheries, and he is Mr. Thompson's superior.

Q. Did you on May 28, 1946, receive a copy of a communication from Mr. Bower to Mr. Thompson?

A. I did.

Q. Would you indicate whether or not this is a copy of that telegram?

A. It is.

Q. Will you read the telegram to the court?

(Testimony of Frank W. Hynes.)

Mr. Arnold: If the Court please, I object until the matter is received in evidence and I am given an opportunity to examine it.

The Court: Objection sustained.

Mr. Berrett: At this time, your Honor, I offer in evidence what is marked as Defendant's Identification E and ask that it be received in evidence.

Mr. Arnold: I object to the introduction of the document upon the grounds it is incompetent, irrelevant, and immaterial.

The Court: Objection sustained.

Mr. Berrett: May I ask that this be marked as Defendant's Identification F? [324]

(Copy of telegram from Frank W. Hynes to Mark Meyer, dated June 4, 1946, was marked by the clerk of the court as Defendant's Identification F.)

Q. (By Mr. Berrett) Mr. Hynes, did you, on June 4, 1946, send a further telegram to Mr. Mark Meyer at Kodiak in regard to the enforcement of this regulation? A. I did.

Q. I will read the contents of this purported telegram from Hynes, Fish and Wildlife Service—

Mr. Arnold: Just a minute. If the Court please, we object to reading documents into the record which have not been received in evidence.

The Court: Objection sustained.

Q. (By Mr. Berrett) Mr. Hynes, will you tell us the purport of that telegram?

(Testimony of Frank W. Hynes.)

Mr. Arnold: If the Court please, we object to that upon the ground that it is incompetent, irrelevant, and immaterial, and I wish to state this: that on this matter of correspondence of Mr. Hynes to Mr. Meyer, it is true that plaintiffs have offered in evidence the text of a wire from Mr. Hynes to Mr. Meyer which we contend was an instruction to enforce this regulation. I wish also to say that I feel that the plaintiffs in this case have been guilty of belaboring this question of threat. Our contention is, and the authorities support our contention, that the promulgation of this regulation in itself endangered our property and entitled us to seek this relief. [325] As I say, we have tended to belabor the proposition by showing further the affirmative policy of the Fish and Wildlife Service and of the defendant, Mr. Hynes, to do what they are bound to do, to proceed to enforce the regulation; and we did introduce into evidence a telegram, instruction from Mr. Hynes to Mr. Meyer, and we also proved that the plaintiffs in this case, or their agents and superintendents, had knowledge of those instructions and the threat therein contained. Now I object to the introduction of any instructions or telegraphic authority or statements of policy sent by Mr. Hynes to Mr. Meyer after that date, unless it be first shown that plaintiffs had knowledge of it.

The Court: Objection sustained. We will take a recess at this time until two o'clock.

(Court was adjourned until two o'clock p.m., October 29, 1946, at which time it was duly

(Testimony of Frank W. Hynes.)

reconvened and the following proceedings took place:)

The Court: Are ~~counsel~~ ready to proceed with the case of Grimes Packing Company against Hynes?

Mr. Arnold: Plaintiff is ready, your Honor.

Mr. Berrett: Defendant is ready. Call Mr. Hynes to the stand.

(Mr. Hynes resumed the witness stand for further examination.)

Q: (By Mr. Berrett) Mr. Hynes, I think in our previous [326] questioning of you that you indicated that you had received a telegram, or had sent a telegram on June 4, 1946, to Mr. Mark Meyer at Kodiak. Is that correct?

A: That is correct.

Q: I show you what is marked as Defendant's Exhibit F and ask you if that is a copy of the exact telegram sent.

A: It is.

Mr. Arnold: If the Court please, that is not Defendant's Exhibit F but Identification. Is that correct or is it not?

Mr. Berrett: Yes, that is right. At this time, your Honor, I would like to offer in evidence what is marked for identification as Defendant's Exhibit F.

Mr. Arnold: If the Court please, we object to receipt of the exhibit in evidence on the ground, first, that it is a communication from one officer of the Fish and Wildlife Service to another and not

(Testimony of Frank W. Hynes.)

relevant to this controversy, and, second, upon the further ground that it isn't shown that any of the plaintiffs or their agents had notice of it.

The Court: Objection sustained.

Mr. Berrett: I would like this marked for identification as Plaintiff—Defendant's Exhibit G in the case at issue.

(Copy of telegram from Ward T. Bower to Thompson, dated June 3, 1946; was marked as Defendant's Identification G by the clerk of the court.)

Q. Mr. Hynes, did you, or did you not, on June 3, 1946, receive a radiogram addressed to Thompson, Fish and Wildlife Service [327] Juneau, Alaska, from Ward T. Bower in Chicago?

A. I did.

Q. I show you what is marked as Defendant's Identification G and ask you if that is the routine copy you received.

A. It is.

Q. Does it pertain to the Karluk situation?

A. It does.

Mr. Berrett: At this time, your Honor, I offer in evidence what is marked as Defendant's Identification G.

The Court: Show it to the adverse counsel, please.

Mr. Arnold: If the Court please, we object to the introduction of the exhibit on the ground that it is an interagency communication, not relevant to this controversy, and upon the further ground that

(Testimony of Frank W. Hynes.)

There is no showing that the plaintiffs or their agents had knowledge of it.

The Court: Objection sustained.

Mr. Berrett: I ask you to mark for identification this document as Identification H.

(Copy of letter from Warren W. Gardner to Mr. Arnold, dated June 5, 1946, was marked by the clerk of the court as Defendant's Identification H.)

Q. (By Mr. Berrett) Mr. Hynes, did you receive, on or about the 18th day of June, 1946, a copy of a letter sent from the United States Department of the Interior, from Mr. Warren W. Gardner, solicitor, regarding the enforcement of the fisheries' regulation we have previously alluded to? [328]

A. Is that the letter addressed to Mr. Arnold?

Q. Did you receive such a letter?

A. I did.

Q. I ask you to examine what is marked as Defendants' Exhibit H and ask you if that is a copy of the letter you received? A. It is.

Mr. Berrett: Your Honor, at this time I would like to introduce in evidence a copy of a letter addressed to Mr. Arnold, counsel in this case for the plaintiffs, from the solicitor of the Department of the Interior, Mr. Warner W. Gardner.

Mr. Arnold: If the Court please, we object to receipt of the exhibit in evidence upon the grounds, first, that it is not the best evidence; it purports to be a copy of the original sent to the defendant

(Testimony of Frank W. Hynes.)

Hynes, as an interagency communication; no proper foundation has been laid for the introduction of the copy, no proof of loss of the original, nor proof of inability to obtain the original; no request for the production of the original has been served. We object upon the further ground that the contents of the letter are not relevant to this controversy. An examination of the document will show that it was written by the solicitor of the Department of the Interior, and it was addressed to me in my capacity as an executive of the Alaska Salmon Industry, Incorporated. It has to do with the discussion and arrangements relative to a [329] friendly suit or a test suit to test the validity of the order establishing the Karhuk Reservation and the power of the Fish and Wildlife Service to enforce. The negotiations or exchange of correspondence, since it did not culminate in an arrangement, becomes *functus officio*, the same as the negotiations preliminary to the drafting of the contract, or the same as the evidence sought to be introduced for the purpose of showing offers of compromise, or anything of that kind. It merely amounts to preliminary conversation or exchange of correspondence which did not culminate in an arrangement, and we object to it on that ground, upon both grounds.

The Court: May I see it? 7

Mr. Berrett: Your Honor, in regard to this, I would like to demand that the plaintiffs, at this point, produce the original or be willing that the copy of the original be introduced into evidence,

(Testimony of Frank W. Hynes.)

it being manifestly not within our power to produce the original in this case.

The Court: We have a court rule that you must demand anything you want from an adverse party early, not at the last minute.

Mr. Berrett: Our claim for this letter, your Honor, is not that these negotiations resulted in the suit that was proposed, but that these negotiations were responsible for the sending of Exhibit 4 of the plaintiffs to Mark Meyer, which they have deemed a threat and is explanatory of that telegram, [330] being addressed to the plaintiffs themselves. They are fully aware of its contents.

Mr. Arnold: If I may be permitted, in response to counsel's statement, I should like to point out that the letter was neither sent by the defendant Hynes, nor addressed to the defendant Hynes. It is merely a copy of a letter from the solicitor of the Department of the Interior to myself.

The Court: Objection sustained.

Mr. Berrett: I would like to mark this telegram Defendant's Identification I.

(Telegram from Warner W. Gardner to Frank T. Hynes, received on June 14, 1946, was marked by the clerk of the court as Defendant's Identification I.)

Q. (By Mr. Berrett): Mr. Hynes, did you have any evidence reach you that the letter previous to the last shown to you actually reached the plaintiff in this action? Did you receive any word from

(Testimony of Frank W. Hynes.)

Washington that they had agreed to the proposition set forth in that letter?

Mr. Arnold: If the Court please, I object to that as irrelevant.

The Court: Objection sustained.

Q. (By Mr. Berrett): Did you not receive, Mr. Hynes, on June 14, 1946, a communication from the Interior Department at Washington, D. C., addressed to yourself at Juneau, Alaska, setting forth that the plaintiffs had agreed to a test case?

Mr. Arnold: If the Court please, I object to that as irrelevant. [331]

The Court: Objection sustained.

Q. (By Mr. Berrett): Did you receive a telegram on that date, Mr. Hynes? A. Yes.

Q. I ask you to look at this particular telegram and state whether that is the telegram sent from the Department of the Interior to you on that date? A. It is.

Q. And does it concern the enforcement of the fisheries' regulation now in question?

A. It does.

Mr. Berrett: Your Honor, I wish to offer in evidence what is marked as Defendant's Identification I.

Mr. Berrett: If the Court please, we object to the introduction of the exhibit upon the ground it is an interagency communication irrelevant to this controversy, and upon the further ground that there is no showing that the plaintiffs had notice of the

(Testimony of Frank W. Hynes.)

dispatch of such communication or of the contents of it.

The Court: Objection sustained.

Mr. Berrett: I ask you to mark the document for identification.

(Copy of letter from Frank W. Hynes to Seton Thompson, of date June 14, 1946, was marked by the clerk of the court as Defendant's Identification J.)

Q. Mr. Hynes, you testified a moment ago that you received a [332] telegram from your superiors in Washington on the 14th of June, 1946. What did you do in response to that telegram?

A. I believe I wrote a letter to Thompson at Cordova, advising him of the developments on the Karluk matter.

Q. Will you examine what is marked for identification as Defendant's Identification J, and I ask you is that a copy from your files of that particular letter? A. That is a copy of that letter.

Q. Mr. Hynes, in regard to the program of enforcing regulation 208.23 (r), what steps did you take on the date of June 14, 1946?

A. We—My office started to prepare letters to the fishery operators, the packers in the Kodiak district, as we were instructed to do by Mr. Gardner.

Q. What were these letters for?

Mr. Arnold: Now, if the Court please, I object to the question on the ground that it is irrelevant.

(Testimony of Frank W. Hynes.)

and immaterial, the purported instructions of Mr. Gardner or the telegram incorporating them, which was offered in evidence as an exhibit. The Court ruled it was not admissible, and I object to this witness testifying to any step he took pursuant thereto as irrelevant; upon the further ground that there is no showing that their steps were within the knowledge of the plaintiffs or their agents.

Mr. Berrett: Your Honor, these questions were not [333] directed as to what he did pursuant to the telegram. I asked him what he did upon June 14, 1946, what steps he took to enforce the regulation. He indicated, in answer to that, that he prepared letters to send out to his men. Now I have asked him what the letters were to do; what instructions did he give.

Mr. Arnold: Perhaps I am in error here. I understood him to say that he prepared letters to send to the plaintiffs. Now that was really the basic ground of my objection.

Mr. Berrett: Well, that may be. If he considers it one of the steps in enforcing the regulations to inform the people that he was going to enforce it or what he was going to do, you surely wouldn't object to that, it being a step in his line of duty.

Mr. Arnold: I have no objection if this is preliminary, and if it his intention to show that this witness did send such a letter to the plaintiff or his agents, but if it is internal or interagency matter that was without the knowledge of the plaintiffs or their agents, I object to it.

(Testimony of Frank W. Hynes.)

The Court: The question seems to be for the witness to testify orally what the letter contained, as near as I can remember.

Mr. Arnold: They haven't really got to the point of that yet. I am anticipating that, your Honor, and I certainly object on that ground. I withdraw the objection to this [334] question and reserve the right to object to the witness testifying orally as to the contents of any written communication or any other steps which he did without the knowledge of the plaintiffs or their agents.

The Court: Read the question.

(The question was read by the reporter:
What were those letters for?)

The Court: That is the question you were asked, Mr. Hynes. You can answer it.

A. These letters were for the purpose of notifying the plaintiffs in this case that regulation 208.23 (r) would be enforced.

Q. Were these letters ever sent, Mr. Hynes?

A. They were not.

Q. Why were they not sent?

Mr. Arnold: I object to that, if the Court please, upon the ground that it is irrelevant and immaterial. If the letters were not sent, the reasons are not material.

The Court: Objection sustained.

Mr. Berrett: At this time, your Honor, I would like to offer in evidence what is marked as Defendant's Identification J, previously referred to here

(Testimony of Frank W. Hynes.)

as the letter from Mr. Thompson to Mr. Hynes, on this date, June 14.

The Court: Very well. Show it to counsel.

(The document was handed to counsel for the plaintiffs.)

Mr. Arnold: I object to the receipt of the exhibit in [335] evidence upon the ground that it is an interagency communication not relevant to this controversy, and on the further ground that there is no showing that the plaintiffs or their agents had knowledge of the communication, and upon the further ground that the principal part of the letter is the quotation of a telegram, which is Defendant's Identification I, which has previously been offered and rejected.

The Court: Objection sustained.

Mr. Berrett: I wish to mark this exhibit for identification.

(Telegram from Warner W. Gardner to Frank T. Hynes, of date, June 14, 1946, was marked as Defendant's Identification K by the clerk of the court.)

Q. (By Mr. Berrett): Mr. Hynes, did you receive another telegram on June 14, 1946, from Warner W. Gardner, solicitor for the Department of the Interior? A. I did.

Q. Relative to this same matter? A. I did.

Q. I show you what is marked as Defendant's Identification K and ask you if that is the telegram you received? A. It is.

(Testimony of Frank W. Hynes.)

Mr. Berrett: I wish to offer at this time in evidence what is marked as Defendant's Identification K.

Mr. Arnold: We object to the exhibit being received in [336] evidence upon the ground that it is an interagency communication; it isn't relevant to this cause; and upon the further ground that there is no showing that the plaintiffs or their agents have knowledge of it.

The Court: Objection sustained.

Mr. Berrett: I wish to have this document marked for identification.

(A copy of amendments to sections 208.18 and 208.23 (r) of the Alaska Commercial Fisheries Regulations, was marked by the clerk of the court as Defendant's Identification L.)

Q. (By Mr. Berrett): Mr. Hynes, have you received a notice, or copy of an amendment to the Alaska commercial fisheries regulations for 1946, section 208.18 and section 208.23 (r)? A. Yes.

Q. I show you what is marked as Defendant's Identification L and ask you what it is.

A. Well, it is an amendment to the Alaska commercial fisheries regulations affecting section 208.23 (r), changing the regulation to prohibit purse sein-ing within five hundred yards of the—

Q. (Interposing): Is there any other amendment included? A. Yes, section 208—

Mr. Arnold (Interposing): If the Court please, I object to the witness testifying and to the testi-

(Testimony of Frank W. Hynes.)

mony of an exhibit that hasn't been admitted in evidence. [337]

The Court: Objection sustained.

Q. (By Mr. Berrett): Who is this from, Mr. Hynes?

A. From the Secretary of the Interior.

Mr. Arnold: If the Court please, I am not sure in my own mind whether the Court takes judicial notice of these regulations or not. They are published in the Federal Register and promulgated pursuant to the provisions of the law. If that is the case, they would be before the court and judicially noticed, and I am going to object to the introduction of this exhibit, because I think that plaintiffs should do that in order to maintain the position which we are going to adopt in this controversy; that an amendment of these regulations which occurred after this suit was commenced and after this preliminary injunction was issued can have no effect on the outcome of this controversy, and, while they may be judicially before the Court, that evidence cannot be received here relative to them nor relative to any policy of the Fish and Wildlife Service, concerning enforcement of the fishing regulations at Karluk, which was adopted after this cause was started and after the preliminary injunction was issued. The exhibit shows on its face that it was an amendment to the fishery regulation, promulgated on August 27, 1946.

The Court: Very well. May I see it?

(The document was handed to the Court.)

(Testimony of Frank W. Hynes.)

The Court: The objection will be sustained.

Q. (By Mr. Berrett): Mr. Hynes, did you instruct your officers to enforce fisheries' regulation 208.23 (r) in 1946?

Mr. Arnold: Just a minute, please. No objection.

A. Only insofar as the telegram to Meyer is concerned, which you have already introduced.

Q. Well, they are not in evidence, so you need to answer this directly.

A. Yes, I did. I instructed Mr. Meyer.

Q. You instructed him to do what?

A. To make a test case on the first day of the fishing season.

Q. Did you recall those instructions later?

Mr. Arnold: If the Court please, now I object to that as irrelevant; upon the further ground that there is no showing that any rescinding or recalling of any instructions was brought to the notice of the plaintiffs or their agents.

The Court: Objection sustained.

Q. (By Mr. Berrett): Mr. Hynes, did you ever bring to the attention of the plaintiffs in this case, your intention later in the season, whether you would or would not enforce this regulation?

Mr. Arnold: Would you read the question, please?

(The last question was read by the reporter.)

Mr. Arnold: We object to the question as not clear, not limited as to the time, whether it was

(Testimony of Frank W. Hynes.)

before or after the institution of this suit or the issuance of this injunction. [339]

Mr. Berrett: May I withdraw that question then?

The Court: Very well. It may be withdrawn.

Mr. Berrett: And state it this way.

The Court: Yes.

Q. (By Mr. Berrett): After sending the first telegram, identified in this case as Plaintiffs' Exhibit 4, your first telegram to Mr. Meyer, did you thereafter and before the institution of this suit direct your agents or in person inform the plaintiffs that you would not make any arrests or seizures under this regulation? A. I did.

Q. On what date did you thus inform the plaintiffs?

A. I don't recall the exact date, but it was within a very short time after the first telegram to Mr. Meyer instructing him to take no action.

Q. Pursuant to that information to the plaintiffs, did you, or in connection with it, did you instruct your employees not to make arrests?

Mr. Arnold: Now, I object to that, if the Court please. There has been no adequate showing here that the plaintiffs were notified.

The Court: Well, I think you have let the question go by without objection and your remedy now is on cross-examination.

Mr. Arnold: Very well.

The Witness: Repeat that question. [340]

(Testimony of Frank W. Hynes.)

(The question was read by the reporter:
Pursuant to that information to the plaintiffs,
did you, or in connection with it, did you in-
struct your employees not to make arrests?)

A. Yes.

Q. Mr. Hynes, were any arrests or seizures or-
dered during—after the time when you so informed
the plaintiffs and so instructed your employees? Up
to this date were any seizures or arrests made?

Mr. Arnold: Will you read the question, please?

(The question was read by the reporter.)

Mr. Arnold: I object to the question as irrele-
vant and not susceptible of direct answer. I have
no objection to the witness answering as to whether
or not he made arrests or arrests were made, but
the first part of the question seeks to elicit infor-
mation as to whether arrests were ordered, and to
that portion of it, I object, there being no showing
that it was within the knowledge of the plaintiffs
and on the further ground that interagency orders
issued in this matter would be irrelevant.

The Court: I think there are several questions
in one. I will sustain the objection. It isn't quite
clear what you are asking Mr. Hynes.

Mr. Berrett: I will withdraw the question then
and ask it in two questions. [341]

Q. (By Mr. Berrett): Mr. Hynes, after the
date when you notified the plaintiffs that you would
not enforce the regulation and you instructed your
employees not to enforce the regulation, did you

(Testimony of Frank W. Hynes.)

subsequent to that time order any arrests or seizures under this regulation?

Mr. Arnold: If your Honor please, we object to that as irrelevant, and upon the further ground that there is no showing that any such orders, if they were issued, were brought to the knowledge of the plaintiffs or their agents.

The Court: Objection overruled. You may answer. A. No arrests or seizures were made.

Q. And this question also: Were any ordered to be made? A. None.

Q. I then ask you the question: Were any arrests or seizures actually made? A. None.

Q. Do you know, Mr. Hynes, whether a test case was actually started?

Mr. Arnold: I object to that, if the Court please, on the ground that it is irrelevant.

The Court: Objection sustained.

Mr. Berrett: You may cross-examine.

Cross-Examination

By Mr. Arnold:

Q. Mr. Hynes, you testified that some time after the dispatch of [342] the telegraphic instructions which you sent to Mr. Meyer on May 25 that you notified plaintiffs that no effort would be made to enforce the regulation. Is that correct?

A. Those letters were not dispatched; they were written, but not sent.

(Testimony of Frank W. Hynes.)

Q. Then did you notify the plaintiffs that no effort would be made to enforce the regulation?

A. No.

Mr. Arnold: That is all, Mr. Hynes.

Redirect Examination

By Mr. Berrett:

Q. In the direct examination, Mr. Hynes, to my question as to whether, after you had first notified Mr. Meyer to make a test case—I asked you this question: After that time, did you through your agents or personally notify the plaintiffs that you would not enforce the regulations. Your answer to that was that you had so informed them.

A. I informed my agent.

Q. Now, on cross-examination the question was asked you, whether you had notified the plaintiffs or made any effort to notify them and you say no effort was made. Now which is the case?

A. I notified my agent at Kodiak that no effort would be made.

Q. And did they notify the plaintiffs?

A. I can only assume that he did.

Mr. Arnold: Now, if the Court please, I move to strike [343] the answer as not responsive to the question.

The Court: It may be stricken.

Q. Mr. Hynes, are there a number of areas closed to fishing at the present time—I will put it this way: During the season, are there a number

(Testimony of Frank W. Hynes.)

of areas that are closed completely to fishing, during the 1946 season? A. Yes.

Q. What was the purpose of its being closed generally?

Mr. Arnold: I object to that, your Honor, as not indicating any connection with this controversy at all, being irrelevant and incompetent and being outside of the issues.

The Court: Objection sustained.

Mr. Berrett: That is all.

The Court: That is all, Mr. Hynes.

(Witness excused.) [344]

LARRY ELLANAK,

called as a witness on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination.

By Mr. Berrett:

Q. Will you state your name?

A. Larry Ellanak.

Q. How old are you, Larry?

A. Fifty-one. I will be fifty-two two or three days.

Q. Where do you live?

A. I live at the village of Karluk.

Q. In that village, Larry, do you hold any office with your native corporation?

(Testimony of Larry Ellanak.)

A. I do. I do. I am member of the council at Karluk village.

Q. Do you hold any other office?

A. Yes. Vice President.

Q. Vice President of the council?

A. Of Karluk village council.

Q. Were you formerly president of the council?

A. Yes, I was.

Q. In what year was that?

A. '44 and 1945.

Q. Until the spring of this year?

A. Until the spring of this year.

Q. And prior to that time, were you ever tribal chief? [345]

A. I was a tribal chief from '38 to '42.

Q. Do you also represent your native corporation in the Union?

A. Yes, I am a representative by our corporation from Karluk as a union delegate.

Q. What do you do for a living there?

A. All we do for a living is fishing.

Q. Is that true of others in the village of Karluk?

A. That is true, and through all the villages, all the Karluk natives live by fishing only.

Q. Has that always been the occupation of the natives of Karluk to your knowledge?

A. Always been since I landed in 1934 to make my home and stay in Karluk.

Q. Do you do any trapping?

A. We do trapping, but it isn't to be depend on.

(Testimony of Larry Ellanak.)

Q. Could you tell us about how much you earned trapping in 1945?

Mr. Arnold: If the Court please, I object to the question as irrelevant and outside of the issues of this case, and it has no bearing on this controversy. I want to state it isn't my desire to interfere with counsel in examining a native witness, but the issues are drawn here, and I feel that we ought to, and will have to, object and make a reasonable effort to hold the testimony within the issues. I object to this question.

Mr. Berrett: Your Honor, the economy of the Karluk natives [346] may have a great bearing upon the outcome of this case. What they do for a living, what they depend upon for a living, may have a determination as to what congress intended, but the act under which the Secretary of the Interior promulgated the setting aside of the reservation in the Annette Islands fisheries case, with which your Honor is familiar. That became a very determining factor. We feel that, in order to show the intent not only of the Secretary of the Interior, but the congress of the United States, in providing for reservations in all of Alaska, the economic picture becomes important, and it is very material to this case. The questions I am asking this witness are to bring out the manner by which the natives of Karluk live and their dependence upon fishing. I think it is entirely probative, certainly so much so as the testimony of the witnesses of the plaintiff which goes into the fishing industry and the susten-

(Testimony of Larry Ellanak.)

ance of the fishing industry. The two are interrelated.

The Court: Objection sustained.

Q. (By Mr. Berrett) Mr. Ellanak, what is the nature of the country of the Karluk Reservation?

A. I can't get you.

Q. Pardon? A. I can't get you.

Q. What kind of country is it? Is it flat land or mountainous land around Karluk? [347]

A. Yes, it is. It isn't all flat place where we are living. It is all hill here and hill there; almost crowded in one little valley. It is just a small bit of a place and some others are way over there and some others way across. That is a poor country to bring up anything or like agriculture or anything like that.

Q. Does it have any timber on it?

A. There is no timber. Only timber we get is the drift wood.

Q. You were president of the council, were you not, in 1944 when your council voted for a reservation?

A. I was voted for as president of Karluk council, president, in May, 1944.

Q. And in May of 1944 did your council vote to become a reservation, accept the reservation?

A. Yes.

Q. How many people are living in Karluk?

A. In rough guess, I would say one hundred forty or fifty. That is just a rough guess . . . pretty close . . . I am sure pretty close to it.

(Testimony of Larry Ellanak.)

Q. You testified that you and the other natives there lived by fishing. How do you operate your fishing?

A. We operate our fishing in the beach, beach seining, and we operate by launches.

Q. Do all the natives fish that way?

A. About forty Karluk natives fishes in this way, in beach seining. [348] About two or three boats goes out purse seining.

Q. What area do you fish with your beach seines? A. Karluk area.

Q. What part of Karluk in relation to the beach?

A. Spit side and improvement side.

Q. That is quite close to the village?

A. Right in front of our village.

Q. Has your council lately passed any ordinances in regard to regulating fishing in that area?

Mr. Arnold: Just a minute * * * No objection.

The Court: Read the question.

(The question was read by the reporter.)

A. What is ordinance?

Q. Any regulations to keep others than you people from fishing there?

A. I couldn't quite get you.

Q. What I mean by that is: Is there an area here around Karluk, close in, where you do your beach seining, where you, as a council, passed a rule that no people but beach seiners can be there?

A. Last year we did that once, restrict a little

(Testimony of Larry Ellanak.)

area that we keep closed, and that didn't last long.

Q. And others than the natives, other than those beach-seining, were supposed to keep out of that area?

A. Keep out of that little small area what we restrict from beach [349] out five thousand feet from the beach out. We had markers on one side. Then from the marker, mouth of the river, we first had a thousand yards, 1944. '45, in the spring, we brought it back to five hundred feet, in order to give purse seiners more room.

Q. Did you mark this area that you restricted? Did you have some mark so that fishermen could tell where it was?

A. Yes, sir, we had markers. We had signs on each end of the area where we restricted, where we put the markers.

Q. And that area was determined upon by the council, is that it?

A. Yes, sir.

Q. During the year 1946, Larry, this summer, you fished this same area, did you?

A. We fished the same area, yes, sir.

Q. Were you interfered with by these outside fishermen, these purse seiners?

A. We do not interfere.

Q. Did they interfere with you?

A. They do interfere with us.

Q. They do interfere with you?

A. They do interfere with us.

(Testimony of Larry Ellanak.)

Q. Did they interfere with you in the early part of the season? A. They did not.

Q. When did their interference start?

A. That I can't remember * * * around July month all of a sudden [350] purse seiners came into that area.

Q. Did they give any excuse for doing it at that time?

A. Not that I know. There is a man back there could do better. I have a man here as a witness that would be better. He did the seining. He was in the beach. He is the man that goes around with the seine.

Mr. Berrett: You may question the witness.

Cross Examination

By Mr. Arnold:

Q. You fish for the Alaska Packers Association?

A. I do, yes, sir.

Q. You live in their bunkhouse and messhouse during the fishing season? A. I do.

Q. You work for the Alaska Packers Association at Karluk in the spring before the fishing season starts?

A. We do. We do spring work before the fishing.

Q. What do you do during the fishing season?

A. We do fishing.

Q. For the Alaska Packers Association?

A. Yes, sir.

(Testimony of Larry Ellanak.)

Q. What do you do in the fishing part? Do you run the launch or the * * *. or do you run the winch? Tell us what you do.

A. We run the launch. [351]

Q. I mean you, Mr. Ellanak. What do you do?

A. I do dragging the beach.

Q. You drag the beach? A. Yes, sir.

Q. How much do you get paid?

A. By fish.

Q. How much?

A. By fish we get paid. We don't do get no monthly wages.

Q. You get paid by the fish?

A. Paid by the fish.

Q. Who pays you? A. Alaska Packers.

Q. All the other boys at Karluk village work and fish the same way? A. Yes, sir.

Q. Purse seine boats started to interfere along in July month? A. Around July month.

Q. They interfered with the Alaska Packers beach seines, is that right? A. Yes.

Q. You boys fish for the Alaska Packers' Association, don't you?

A. We do fish for Alaska Packers' Association.

Q. When purse seines come in, the Alaska Packers' Association beach seine is interfered with, is that right? A. Couldn't get you. [352]

Mr. Arnold: I withdraw the question.

Q. How did purse seines interfere in July month?

A. That I can't say how they start to interfere.

(Testimony of Larry Ellanak.)

Q. But after they started, later, what did they do to interfere?

A. They keep us on the beach. We have to wait for them, till they get through.

Q. You have to wait until they make their set before you can run Alaska beach seine out, is that right?

A. We have to wait after they get through. We do not make haul until they give us room to go out. That is what I mean.

Q. Then there is no room for the Alaska Packers' beach seiners to go out? Right?

A. That's right.

Q. Purse seiners interfere with Alaska Packers' Association? Right?

A. Yes, sir.

Mr. Arnold: That is all.

Redirect Examination

By Mr. Berrett:

Q. Larry, did you hear about any court action, or anything, at the time that these purse seiners started to come into your region?

A. We heard it before that there was court going on, and we didn't know what about. We did not really know what it was about. [353]

Q. It was when they got word of that that they started to come in; is that right?

A. I didn't hear anything when the word came for them purse seiners to operate inside the area.

Q. They just all of a sudden came in?

(Testimony of Larry Ellanak.)

A. Just all of a sudden we found out they were inside.

Q. How much did that affect the amount of fish you would have taken otherwise? Did you catch as many fish as you would have done had they not come in within that area?

A. We could have doubled our catch if they didn't interfere in our area.

Q. How do you figure that?

A. We figure that because our catch get less.

Q. Did you sometimes put out your net and pull it in empty because the purse seiners had taken the fish in that area?

Mr. Arnold: If the Court please, I object to that question as leading.

The Court: Objection sustained.

Q. (By Mr. Berrett) Will you explain how the purse seiners interfered with the number of fish you did get?

A. All right. In the beginning of the spring we got to run our line from one post and from that post we make hauls until the season is over. One post to another post. So that is for that reason we have to wait for the purse seiners to get all of their seine before we make set. Sometimes we make set [354] and have to stay in, way out there with our seine stretched out—purse seiners inside—until they give us room to turn around. Between the time all the fish goes out of the seines, while we stay out there with the seine until this purse seiner gets ready. We do not want to hurt them, or else we do not want

(Testimony of Larry Ellanak.)

to close in and pull all our seine in with them inside. For this reason we have to wait until they get ready and go out and then is the time we bring in our seine to the beach.

Q. How are you paid for the fish you catch?

A. How?

Q. Let me ask you this: How much money did you make this season there in catching fish?

Mr. Arnold: We object to that upon the grounds it is immaterial.

The Court: Objection sustained. Don't answer.

Q. (By Mr. Berrett) You would say, however, that you would have caught twice as many had you complete the season without this interference?

A. Yes.

Mr. Berrett: That is all.

Mr. Arnold: That is all. [355]

NICK MALUTIN,

a witness on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Berrett:

Q. Will you state your name?

A. Nick Malutin.

Q. How old are you, Nick?

A. Forty-five.

Q. Forty-five? A. Yes.

(Testimony of Nick Malutin.)

Q. Where do you live? A. Karluk.

Q. How long have you lived at Karluk?

A. Well, I lived in Karluk for over twenty-five years. I have been there before, but I go in and out until I settle for good in Karluk.

Q. Will you talk a little louder when you talk, Nick, so we can hear you. Did you hold any position with your native council at Karluk?

A. Yes. I was one of the council in town.

Q. You are a member of the Indian council?

A. Yes.

Q. What do you do for a living?

A. Fishing.

Q. At Karluk? [356] A. Yes.

Q. Do you do anything else for a living?

A. No; that is all we do at Karluk is fishing.

Q. What kind of country is the reservation at Karluk?

A. Well, there is hills and no flat, and hills here and there and lagoons.

Q. Is there any farm land?

A. No, I don't think so. There is no farming ground.

Q. Is there any timber on the hills?

A. No.

Q. Is there any fur-bearing animals?

A. Well, I don't know. There isn't much caught in Karluk when they go out trapping.

Q. What type of fishing do you do, Nick?

A. When the season open in the summer.

(Testimony of Nick Malutin.)

Q. What kind of fishing? How do you fish?

A. Oh, I fish beach seining.

Q. Beach seining? A. Yes.

Q. And what area do you fish? What place?

A. I fish in the improvement side.

Q. That is very close to the river, is it?

A. Yes, on one side of the river.

Q. And along the beach?

A. Along the beach. [357]

Q. You have an ordinance, do you not, of your Indian council that prohibits other people, the beach seiners, in that little area where you are fishing; is that correct? A. Yes.

Q. About how much of an area was reserved by your council?

A. Well, over on my side it was five hundred yards.

Q. Along the beach?

A. Yes, along the beach.

Q. How far out into the ocean?

A. I can't remember just how far.

Q. How far on the spit side?

A. Well, the spit side was supposed to be was supposed to be, instead of a thousand yards, we took in about six hundred yards from the marker, from the river marker, to this other marker.

Q. About six hundred yards?

A. Six hundred yards; instead of taking one thousand yards, we took only six hundred yards.

(Testimony of Nick Malutin.)

as improper redirect, and also as being irrelevant, incompetent, and immaterial.

The Court: Objection sustained.

Q. (By Mr. Berrett): Were various permits sold by your people to outside people to fish?

Mr. Arnold: I object to that as improper redirect.

The Court: Objection sustained.

Mr. Berrett: That is all.

Mr. Arnold: That is all.

(Witness excused.) [363]

• LOUIE C. PETERS,

a witness on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Berrett:

Q. Will you state your full name?

A. Louie C. Peters.

Q. Where do you reside, Mr. Peters?

A. Juneau, Alaska.

Q. What is your occupation?

A. I am an Alaska native service employee.

Q. What is your position with the Alaska native service?

A. Director of Native Resources.

Q. In your capacity as Director of Native Resources, are you acquainted with the region of Karluk?

A. Somewhat, yes.

(Testimony of Louie C. Peters.)

Q. Have you visited Karluk? A. Yes, sir.

Q. Were you there in the summer of 1944?

A. Yes, sir.

Q. Did you receive, in your capacity, any reports and files from Karluk? A. Yes, sir.

Q. When you were there in 1944, Mr. Peters, did you take any photographs of the region of Karluk?

A. Yes, sir.

Mr. Berrett: Will you mark these for identification?

(Three photographs were marked by the clerk of the court as Defendant's Identification M (a), M (b) and M (c).)

Q. (By Mr. Berrett): I show you what is marked as Defendant's Identification M (a), M (b) and M (c), and ask you what they are?

A. They are pictures and enlargements of the Karluk Spit and the Karluk village, that area.

Q. This one marked Exhibit M (a), what part of the region is that?

A. That takes in the Karluk Spit and the improvement side and a part of the village and part of the shore line and also Tanglefoot Beach is shown on there.

Q. And that which is marked M (b), what does that represent?

A. That is the entire Karluk Spit. It shows a very small part of the improvement side.

Q. And does that look in the opposite direction from that marked M (a)?

A. Yes. That is the opposite direction.

(Testimony of Louie C. Peters.)

Q. And this which is marked M (c), what does that represent?

A. That represents the Karluk Spit, the improvement side, and also shows a good portion of the river and part of the lagoon.

Mr. Berrett: We offer in evidence, what is marked Defendant's Identification M.

Mr. Arnold: We have no objection. [365]

The Court: It may be admitted.

(Defendant's Identification M° (a), M (b) and M (c), was marked by the clerk of the court as Defendant's Exhibits 5 (a), 5 (b) and 5 (c). .

Q. (By Mr. Berrett): Mr. Peters, from your observation of the region set aside as the Karluk Reservation, what would you say is the nature of the country?

Mr. Arnold: If the Court please, I object to that as irrelevant and immaterial and outside of the issues of this case. The only question involved here is whether the Secretary of the Interior's order creating the reservation is valid and whether the reservation respecting fishing is valid.

The Court: Objection sustained.

Q. (By Mr. Berrett): Mr. Peters, were you present at the time the natives voted for a reservation? A. Yes, sir.

Q. Was that whole property taken?

A. It was the property taken.

Q. Did a sufficient percentage of the natives vote for the reservation? A. Yes, sir.

(Testimony of Louie C. Peters.)

Mr. Berrett: Will you mark this document for identification?

(Thereupon a copy of the minutes of the meeting held by the Karluk native council on May 23, 1944, was marked by the clerk of the court as Defendant's Identification N.)

Q. Did you attend a meeting of the native council on May 23, 1944? [366] A. Yes, sir.

Q. Did you obtain a copy of the minutes of that meeting? A. Yes, sir.

Q. I show you what is marked Defendant's Identification N and ask you what that is.

A. It is a copy of the minutes of the meeting held by the Karluk native council on May 23, 1944.

Q. Is this a copy made by you?

A. It was made at Karluk. I don't recall who made the copy.

Q. Did you compare it with the original?

A. Yes.

Mr. Berrett: We offer Plaintiff—Defendant's Identification N in evidence.

Mr. Arnold: If the Court please, we object to the receipt of the exhibit in evidence upon the grounds, first, that it is not the best evidence; it is not an authenticated copy; no foundation has been laid for the introduction of secondary evidence. We object upon the further ground that it is immaterial and outside of the issues of this case.

The Court: I will sustain the objection.

Mr. Berrett: Will you mark this document for identification?

(Testimony of Louie C. Peters.)

(Thereupon a copy of a telegram sent by Louie C. Peters was marked by the clerk of the court as Defendant's Identification O.)

Q. (By Mr. Berrett): Mr. Peters, you testified that you were [367] present at a meeting of the Indian council at Karluk on the 23rd day of May, 1944. Will you indicate to us the business transacted at that meeting?

Mr. Arnold: I object, if the Court please, upon the ground that it is immaterial and irrelevant and outside of the issues of this case. It is an effort on behalf of the witness to testify orally to matters contained in an exhibit, the introduction of which was just denied.

Mr. Berrett: I don't know how counsel knows what the answer is going to be to that question.

Mr. Arnold: It is certainly reasonable to anticipate the business transacted is the business covered in the minutes just offered.

The Court: I will sustain the objection.

Q. (By Mr. Berrett): Mr. Peters, after that meeting, on the 24th day of May, 1946, did you send a telegram to the various plaintiffs in this action?

A. I did.

Q. Would you state your reason for so doing?

A. I was advising the salmon companies and unions involved in the fishing around the Karluk area of the action taken by the council regarding an inner area to be closed during that season.

Q. I show you what is marked as Defendant's

(Testimony of Louie C. Peters.)

Identification O, containing two sheets, and ask you what that is. [368]

A. You mean you want me to read this?

Q. No. No, I want you to tell us is that the—

A. (Interposing): That is the telegram, yes.

Q. A copy of the telegram you sent?

A. Yes.

Mr. Berrett: We offer in evidence what is marked as Defendant's Identification O.

Mr. Arnold: No objection.

The Court: It may be admitted.

(Defendant's Identification O was marked by the clerk of the court as Defendant's Exhibit No. 6.)

Q. (By Mr. Berrett): Mr. Peters, you indicated earlier in the examination that you received reports from Karluk in your fishery capacity. Did you receive a report in regard to the issuance of permits to fishermen during 1946?

A. 1946?

Q. Yes. A. Yes.

Q. Did you receive a copy of those permits?

A. Yes, sir.

Q. When they are issued are they issued in duplicate or triplicate or do you know the process?

A. I am not sure. They were in duplicate, at least. I don't know whether they are in triplicate or not.

Q. But you did receive a copy at your office?

A. That's right.

(Testimony of Nick Mahutin.)

Q. You mean your ordinance had provided for one thousand yards, but you didn't use it all?

A. No.

Q. In the early part of this year, 1946, did the various boats that came in there to fish who were not residents of Karluk, did they keep outside of your little area? A. Yes. [358]

Q. In doing their purse seining? A. Yes.

Q. Do you recall whether they changed their tactics? Did they come in and bother you later?

A. Yes, it was all of a sudden thing. A floating fisherman came in and told me in the evening that they going in and fish inside of this little area we got, so I didn't know what so stay. I went over and see Mr. Mueller. I asked him if he hear anything about it—

Mr. Arhold: (Interposing) Now, if the Court please, I object to conversations between the witness and Mr. Mueller unless it be shown it was in the presence of the plaintiffs.

The Court: Objection sustained.

Q. (By Mr. Berrett) Nick, do you remember the date when these boats came within this little area?

A. No, I can't exactly remember the date when they first came in.

Q. What month was it in?

A. Oh, I think it was in July month.

Q. About the middle of the month, would you say?

A. Somewhere around in there, but I can't remember the date.

(Testimony of Nick Malutin.)

Q. How did that affect your fishing?

A. Well, it stopped me from going out and making a set, and then we have to wait till they get through. Then when we do go out and make a set, another one come along and make a set inside of your set, and you have to wait, and by that time you lose all your catch. [359]

Q. If these various boats had kept outside of your little area where you had it marked, would you have caught more fish? A. We could.

Mr. Arnold: I object to that as calling for a conclusion and irrelevant.

The Court: Well, it is a conclusion all right. Objection sustained.

Q. (By Mr. Berrett): Nick, because of the purse seiners being in there, did you sometimes bring in empty nets?

A. When they spoil it for us on account of water drift tide.

Q. Did you sometimes have to wait for them to get out of the way? A. Yes.

Cross Examination

By Mr. Arnold:

Q. You fish for Alaska Packers Association?

A. Yes.

Q. How many beach seines do the Alaska Packers' Association have at Karluk? A. Two.

Q. One on the improvement side and one on the spit side; is that right? A. That's right.

Q. What side do you fish?

A. On the improvement side.

(Testimony of Nick Malutin.)

Q. Do you live in the Alaska Packers' bunk house when you are fishing? [360] A. Yes.

Q. And eat your meals in the Alaska Packers' messhouse? A. Yes.

Q. How are you paid for fishing?

A. I get paid by fish?

Q. Who pays you? A. Alaska Packers.

Q. Who gets the fish you catch in your beach seine at Karluk?

A. Alaska Packers gets it and cans it.

Q. They can it where?

A. At Larsen's Bay.

Q. At Larsen's Bay? A. Yes, sir.

Q. Does anybody have any beach seines at Karluk except the Alaska Packers' Association?

A. No.

Q. Do any of the natives at Karluk own any beach seines? A. No.

Q. Do any of the natives at Karluk fish on any beach seines besides the Alaska Packers' beach seines? A. No.

Q. Some of the native boys at Karluk fish on purse seine boats?

A. There is two or three boats; I think there is.

Q. Two or three boats? A. Yes. [361]

Q. How long are the Alaska Packers' beach seines? A. How long they are?

Q. Yes. A. Two hundred fathoms.

Q. Two hundred fathoms? A. Yes.

Q. Do you know how many feet that is? I withdraw that question. It doesn't make any difference.

(Testimony of Nick Malutini.)

Are the Alaska Packers' beach seines bigger than the purse seines?

A. Yes, they are seventy-five fathoms bigger.

Q. Seventy-five fathoms bigger?

A. Bigger.

Q. How long have you fished for the Alaska Packers' Association?

A. Since twenty—since nineteen—let's see—1924—it was 1925.

Mr. Arnold: That is all.

Redirect Examination

By Mr. Berrett:

Q. Nick, were you a member of the council that passed the ordinance restricting this area?

A. Yes.

Q. Do you recall in the ordinance the fact that you provided for permits for fishing to be issued on the reservation? A. Yes.

Q. But they weren't to fish within this beach seining area, is that correct? [362] A. Yes.

Q. You were a member of the council all this time, were you not, and attended all their meetings?

A. I was off one year, but when I come back they elect me again.

Q. But you were there during the whole 1946 season? A. Yes.

Q. And you attended all council meetings?

A. Yes.

Q. Was there any ordinance passed in your council meetings to forbid permits to anyone?

Mr. Arnold: If the Court please, I object to that

(Testimony of Louie C. Peters.)

Mr. Berrett: Will you mark these for identification?

(Thereupon commercial fishing permits issued by the native council of Karluk to a group of fishermen were marked by the clerk of the court as Defendant's Identifications P-1, P-2, P-3, P-4, P-5, P-6, P-7 and P-8.)

Q. (By Mr. Berrett): Mr. Peters, I hand you Defendant's Identification P-1 and ask you to tell us what that is.

A. These are commercial fishing permits issued by the native village of Karluk to a group of fishermen fishing for the San Juan Fishing Company, including the Uganik Bay cannery.

Q. How were these received by you, Mr. Peters?

A. These were received through the mail.

Q. In your office? A. Yes.

Q. In the usual report to your office?

A. That's right.

Q. I will show what is marked as Defendant's Identification P-2 and ask you what that is.

A. These are also commercial fishing permits issued to fishermen or boats fishing for the Parks Canning Company.

Q. During 1946? A.. 1946, yes.

Q. And these copies were received by you in your office? A. That's right.

Q. I hand you what is marked as Defendant's Identification P-3 [370] and ask you what that is.

A. These are also commercial fishing permits

(Testimony of Louie C. Peters.)

issued to boats fishing for Frank McConaghy Company.

Q. During 1946? A. During 1946, yes.

Q. And received by you in your office?

A. Received by me in the Juneau office.

Q. I show you what is marked as Defendant's Identification P-4 and ask you what that is.

A. These are also commercial fishing permits issued to boats fishing for the Kadiak Fisheries at Port Bailey, received by me in the Juneau office in 1946.

Q. I show you what is marked as Defendant's Identification P-5 and ask you what that is.

A. They are also commercial fishing permits of 1946, issued to boats fishing for the Libby, McNeill and Libby, at Mosier Bay.

Q. During 1946? A. During 1946, yes.

Q. I show you what is marked as Defendant's Identification P-6 and ask you what that is.

A. They are also commercial fishing permits issued in 1946 to boats fishing for the Grimes Packing Company at Ouzinkie, and they were received at the Juneau office.

Q. Are these permits those issued at Karluk?

A. Yes.

Q. All of them? A. Yes.

Q. Are these the permits that give the respective holders the rights to fish in the reserved waters of Karluk? A. That's right.

Q. I will show you what is marked as Defendant's Identification P-7 and ask you what that is.

(Testimony of Louie C. Peters.)

A. These are also commercial fishing permits issued in 1946 to boats fishing for the Washington Fish and Oyster Company.

Q. Received by you in the same manner?

A. Received by me in the same manner.

Q. And I show you what is marked Defendant's Identification P-8 and ask you what that is.

A. They are also commercial fishing permits issued in 1946 to boats fishing for the Orcas Canning Corporation—I guess it would be "company".

Q. These were also issued at Karluk?

A. Issued at Karluk in 1946 and received at our Juneau office.

Q. Now, I ask you, Mr. Peters, who issues these permits? A. They are issued——

Mr. Medley: The permits speak for themselves. I object to that.

Mr. Berrett: I withdraw the question. At this time, your Honor, I want to offer in evidence what is marked as [372] Defendant's Identification P-1, P-2, P-3, P-4, P-5, up to 8.

The Court: Show them to the adverse counsel.

Mr. Berrett: They are copies of the permits issued.

Mr. Arnold: If the Court please, we object to the receipt of the exhibits in evidence upon the grounds, first, that no proper foundation has been laid. It has not been shown that this witness has any official capacity with the village of Karluk or is the custodian of the records of Karluk. We object upon the further ground that the plaintiffs

(Testimony of Louie C. Peters.)

in this case are not bound by the permits, they appearing on their face to be documents simply issued by the village of Karluk or some officer of the village of Karluk. We object upon the further ground that they are immaterial and outside of the issues of this case. Our contention is that our right to fish in those waters is not dependent upon the permission granted or withheld by the village of Karluk or the officials of the Karluk village, and it is our position that these exhibits that are offered have no proper connection with this case, and that no proper foundation has been laid for their receipt. It does not appear whether they are originals or duplicates. No effort has been made to establish their introduction as secondary evidence or to explain the location of the originals, if these are not the originals.

The Court: Objection sustained.

Q. (By Mr. Berrett): Mr. Peters, were you the proper custodian of [373] these papers marked as Defendant's Identification P-1 through to 8?

A. Yes, sir.

Q. Were they part of your official file?

A. Yes, sir.

Q. Did you take them out of the files yourself?

A. Yes, sir.

Q. And brought them into this court?

A. That's right.

Q. Would you have had access to the originals?

A. No, sir.

Q. Who would have had the originals?

(Testimony of Louie C. Peters.)

A. The Karluk native village, the organized village.

Q. The organized village. They would be in their files? A. That's right.

Mr. Berrett: Your Honor, I wish to offer again, in evidence, Plaintiff—Defendant's Identification P-1 through to 8.

Mr. Arnold: If the Court please, could I interrogate this witness briefly on this matter?

The Court: Well, do you have any objection to the offer?

Mr. Arnold: Oh, yes, I have. I beg your pardon.

The Court: On the same grounds as before?

Mr. Arnold: Yes.

The Court: I will sustain the objection. [374]

Mr. Berrett: Your Honor, I would like to withdraw this witness for a moment and beg to take the stand myself.

The Court: You know our rule. If you take the stand, you will not be permitted to argue the case.

Mr. Arnold: If the Court please, I am not too familiar with the practice, but if we can waive, we are willing to do so.

The Court: Very well, then, you waive insisting upon the rule. In that case, Mr. Berrett, you will be allowed to take the stand.

Mr. Berrett: The rule will be waived?

The Court: Yes.

(Witness excused.) [375]

WILLIAM E. BERRETT,

called as a witness in behalf of the defendant, having been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Arend:

Q. State your name, please.

A. William E. Berrett.

Q. You are the Assistant United States Attorney for the Fourth Division of Alaska, are you not?

A. Yes.

Q. Mr. Berrett, have you had occasion very recently to visit Karluk village, Alaska?

A. I have.

Q. When did you make that visit?

A. I journeyed to Karluk village, leaving here about October 10th, as I recall it.

Q. This year?

A. Of this year, and I arrived at Karluk village some three days later.

Q. On that visit to Karluk village, did you have occasion to examine any records of the native village itself?

A. Yes, I did.

Q. And what records did you examine there?

A. I examined the minutes of the native village for various deeds, and I also examined all of the permits which had been issued to fishermen by the village of Karluk during the year 1946. [376]

Q. Were those original permits that you examined there?

A. They were.

(Testimony of William E. Berrett.)

Q. Who had charge of the permits that you found there at Karluk village?

A. Well, they were in the immediate possession of Mr. Bingham, the teacher at the school and an officer of the Indian native service. Mr. Bingham signed each of the permits as the representative of the Indian service.

Q. I would like to ask now: Were those the original or were they the duplicate original, do you know?

A. Well, as near as I could tell the copy retained by the Indian village was the original.

Q. Do you know what was given to the fisherman himself?

Mr. Arnold: Now, if the Court please, I object to this question and other similar questions as irrelevant and immaterial and outside of the issues of this case, and the last question upon the ground that it calls for hearsay testimony.

The Court: Objection sustained.

Q. (By Mr. Arend) Mr. Berrett, have you examined the defendant's Exhibits P-1 to P-8?

A. I have.

Q. And did you see these exhibits at Karluk village?

A. I couldn't say that I saw all that are included in the defendant's Identification P-1 to 8, but I did jot down, at the time I examined the originals at Karluk, the numbers of the [377] permits of all those issued to boats that could be identified as company boats. I find I jotted down a few

(Testimony of William E. Berrett.)

that were boats being sold on contract, and I have compared those particular ones with these.

Q. How did you find the comparison?

A. I find they are identical.

Mr. Arnold: I object to this line of questioning. It is incompetent, irrelevant, and immaterial, and outside of the issues of this case. Our position is that an examination made by Mr. Berrett of the records of the alleged village of Karluk is not connected with these issues.

The Court: Objection sustained.

Mr. Arend: We offer these identifications once more.

Mr. Arnold: We renew our objection upon the grounds previously stated.

The Court: Objection sustained.

(Witness excused.) [378]

Mr. Berrett: You may return to the stand, Mr. Peters.

LOUIE C. PETERS,

a witness on behalf of the defendant, having been previously sworn, resumed the witness stand.

Mr. Berrett: You may cross-examine.

Mr. Arnold: No cross-examination.

The Court: That is all, Mr. Peters.

(Witness excused.)

W. G. BRUNSKILL,

called as a witness on behalf of the defendant, having been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Berrett:

Q. Will you state your name, please?

A. W. G. Brunskill.

Q. Where do you reside, Mr. Brunskill?

A. Juneau, Alaska.

Q. What is your occupation?

A. Special officer of the United States Indian Service.

Q. During the 1946 season, Mr. Brunskill, where were you stationed?

A. I was stationed—during 1946, you mean?

Q. Yes.

A. Two places in the States and one in Alaska.

Q. Where was the place in Alaska?

A. Karluk. [379]

Q. Do you recall at what time you arrived in Karluk?

A. I arrived at Karluk at eight P.M. on June 24th.

Q. On your way to Karluk, Mr. Brunskill, did you stop at Kodiak? A. Yes.

Q. At Kodiak, Mr. Brunskill, did you receive any communication in regard to your duties?

A. Yes.

Q. What were you told to do?

(Testimony of W. G. Brunskill.)

Mr. Arnold: I object to that, if the Court please, as irrelevant and immaterial and outside of the issues of this case.

The Court: Objection sustained.

Q. (By Mr. Berrett): Mr. Brunskill, I show you from the files of the case now before the Court the affidavit of George Folta, signed on the 8th day of July, 1946, containing the contents of a telegram purported to have been sent to Mr. Mueller and yourself. I ask you to read from the record the contents of that telegram.

Mr. Arnold: Now, if the Court please, I may possibly be wrong, but I assume that counsel is asking the witness to read from an exhibit attached to the response filed on behalf of the defendant at the time of the hearing on the preliminary injunction. Now, if I am correct——

Mr. Berrett (Interposing): That is correct.

Mr. Arnold: ——in that, I object upon the ground——two grounds——that if that response is now properly a part of the [380] record, it speaks for itself; if it isn't properly a part of the record, then I object to him reading it without its being introduced as an exhibit. Now, the question of this response, whether the response, the preliminary affidavits, and other proceedings taken in this case became functus officio, or obsolete, so to speak, when the hearing on the preliminary injunction was concluded, is something I haven't given much consideration to. If they are functus officio, if they are not properly before the Court, then the exhibits contained therein are not

(Testimony of W. G. Brukskill.)

a proper part of the records on the trial of this case on its merits.

In either event, I object to the reading. If they are properly a part of the record, they speak for themselves, and if they are not, I object to reading from something that has not been introduced in evidence. If they are not to be a part of the record, we have not had any chance to examine them or object to their introduction. In fact, they haven't been offered.

The Court: If you have any authorities that say that they could be used or that it is a part of the record, I will hear you. My idea is that it is not admissible and that it is not a part of the record.

Mr. Berrett: Your Honor, at the time it was submitted in the hearing on the order to show cause, counsel for the plaintiffs raised no objection and it was so admitted, as I [381] understood the record. I am not asking the witness to read it, but merely to observe it and ask him questions concerning it, but if it is part of the record—

The Court (Interposing): As I said I don't think it is. If you have any authority to the contrary, I will hear you.

Mr. Berrett: Not at the moment, I haven't, your Honor. If your Honor would agree to a recess, I would like to submit some.

The Court: How much more testimony do you have?

Mr. Berrett: We have one more witness, your Honor, who has not arrived, though he was notified well in time. We received a wire from him yester-

(Testimony of W. G. Brunskill.)

day. He should have been in yesterday morning, but his plane was grounded. We received another wire from him this morning. He has got as far as Anchorage and his plane is grounded. We have attempted all day long to contact the Alaska Airlines to see when we could expect the plane in. We hope that it will arrive in the ordinary course tomorrow morning, arriving at nine-forty, at which time we could conclude the examination of this witness. We would like a continuance until ten o'clock, which would give time for that witness to arrive.

The Court: We will take a recess until tomorrow at nine-thirty. We will start in early so as to get this argument over without any undue delay. [382]

(Court was adjourned until 9:30 o'clock A.M., October 30, 1946, at which time it was duly reconvened and the following proceedings took place:)

The Court: We will proceed with the case of Grimes Packing Company against Hynes.

(Argument was presented by counsel for defendant and by counsel for plaintiff.)

The Court: I don't think you will be required to cite any more authorities. I think sections 4217 and 4223 of our code make it very clear to me. Section 4217 provides:

"An affidavit may be used to prove the service of a summons, notice, or other paper in an action or proceeding to obtain a provisional remedy,

the examination of a witness, or a stay of proceedings, or upon a motion."

Section 4223 says:

"In all cases other than those mentioned in section 4217 where a written declaration under oath is used, it must be a deposition."

To me that is conclusive. The objection is sustained.

Mr. Berrett: I will recall Mr. Brunskill.

W. G. BRUNSKILL

a witness on behalf of the defendant, having been previously sworn, was examined further and testified as follows: [383]

Further Direct Examination

By Mr. Berrett:

Q. Mr. Brunskill, during the time that you were at Karluk this summer, did you attempt at any time to enforce fisheries' regulation 208.23 (r)?

A. No.

Q. Did Mr. Mueller, your companion?

A. No.

Q. Why didn't you?

Mr. Arnold: Now, if the Court please, we object to that as immaterial.

Mr. Berrett: I will withdraw the question.

Q. (By Mr. Berrett): Mr. Brunskill, on the date—did Mark Meyer, the Fish and Wildlife Agent,

(Testimony of W. G. Brunskill.)

visit Karluk while you were there? A. Yes.

Q. How long did he remain?

A. I saw him about five minutes.

Q. Did he remain in the area for a longer period?

A. Probably one hour.

Q. Do you know whether or not he attempted to enforce that fishing regulation?

A. I don't know what he done there.

Q. Mr. Brunskill, did you observe—or did you attempt, at any time, by word or action, to keep the boats of the plaintiffs' from fishing within the beach seining area? [384]

A. I did not.

Q. Did you at any time go out in a boat, out into the reserved area?

A. I was out there several trips.

Q. What was your purpose, Mr. Brunskill?

A. Well, we were out there one trip on the 22nd of July. We were there early in the morning to see that they didn't set out before six o'clock.

Q. Were you responsible for the enforcing of general fishing regulations other than this pertaining to the reservations?

A. That was our understanding.

Q. On these journeys out into the waters, was it your purpose to do that or to enforce—Just what was your purpose?

A. To enforce fishing regulations.

Q. But not 208.23 (r)?

Mr. Arnold: I object to that, if your Honor please, as leading and calling for a conclusion.

The Court: Objection sustained.

(Testimony of W. G. Brunskill.)

Q. Did you at any time make any journey out into these waters to enforce fishing regulation 208.23 (r)?

Mr. Arnold: I object upon the ground it is repetitious and leading.

The Court: Objection sustained.

Q. Why didn't you make such a journey, Mr. Brunskill?

Mr. Arnold: I object to that upon the ground it is immaterial. [385]

The Court: Objection sustained.

Q. (By Mr. Berrett): Mr. Brunskill, did you observe the boats fishing in the reserved areas of Karluk? A. Yes.

Q. Did you notice the names of the boats?

A. Yes.

Q. Did you ever check those names as against the permits? A. Yes.

Q. Issued by the village of Karluk?

A. Yes.

Q. Did you ever observe a boat of any of the plaintiffs fishing in those waters for which you did not see a permit in the files of the village?

Mr. Arnold: I object to that upon the grounds that it is irrelevant and immaterial and outside of the issues of this controversy.

The Court: Objection sustained.

Q. (By Mr. Berrett): Did you observe any boat that was fishing without a permit?

Mr. Arnold: I object to that upon the grounds

(Testimony of W. G. Brunskill.)

previously stated, and on the further ground it is repetitious.

Mr. Berrett: Your Honor, in the complaint of the plaintiffs they have alleged that they were suffering irreparable damage and they were in danger of losing their boats and gear and that because of threats of arrest their fishermen were [386] not willing to go within the waters of the reserve. Now, there couldn't be any threats of arrest if all of the fishermen fishing there had permits. Now, I think that it is proper for us to show through this type of questioning and evidence that there were no threats of arrest and there was no danger of seizure of gear or equipment, because there was no boat fishing there without a permit. They couldn't be seized; they couldn't be arrested. Now, if that is not permissible, it certainly would then be incumbent upon the plaintiffs to have shown the names of the boats and the skippers and to have furnished considerable evidence that some boat was in danger, and, of course, they have not done that.

Mr. Arnold: If the Court please, this case is at issue on the situation that existed there on the 24th of June, 1946, when this proceeding was commenced. What this witness did after that—did or failed to do—is immaterial, and the question of whether or not these fishermen had permits issued by the native village of Karluk is immaterial, our contention being that efforts of the village of Karluk to establish rules and regulations in regard to fishing on this reserve are invalid and of no effect; and, insofar as

(Testimony of W. G. Brunskill.)

the permits are concerned, we contend it is immaterial whether the fishermen held them or didn't hold them. The purpose of this examination apparently is to show that this witness was not enforcing the ordinances or regulations of the village of Karluk. We contend [387] that that is immaterial. Judge Medley calls my attention to the fact that on the government's theory of this case, if those people violated any of the general regulations either of the village of Karluk or of the Fish and Wildlife Service, they can be prosecuted. The fact that he didn't arrest them still didn't make them immune from arrest.

The Court: It seems that it would be entirely consistent with the plaintiffs' case that none of their fishermen would be in that area because they would be afraid they would be arrested. I will sustain the objection.

Q. (By Mr. Berrett): Mr. Brunskill, did you see boats in that area of each of the plaintiffs?

A. Yes.

Q. Were there many of them?

A. Quite a few, yes.

Q. And they were all within the reserved waters?

A. Yes.

Q. And yet you didn't arrest any of them?

A. No.

Q. Or attempt to? A. No.

Q. Did you ever talk to these fishermen?

A. No.

Q. Did you ever talk to officials of the plaintiff companies? A. Yes. [388]

(Testimony of W. G. Brunskill.)

Q. Did you talk to them in regard to this regulation? A. No.

Mr. Berrett: You may cross-examine.

Cross-Examination

By Mr. Arnold:

Q. On what day did you arrive at Karluk, Mr. Brunskill?

A. I arrived at Karluk June 26th at seven A.M. in the morning.

(The witness referred to his notes.)

Q. I beg your pardon?

A. June 26th at seven A.M.

Q. You arrived at Karluk at seven A.M. on the morning of June 26, 1946? A. Yes, sir.

Q. You are aware that that is the day that the restraining order was issued by this Court restraining the enforcement of this regulation, are you not?

A. No. I don't. I did not get any news of the restraining order for—it was a week or better.

Q. Well, what was your official capacity there?

A. Deputy Fish and Wildlife enforcement agent, I guess you would call it.

Q. What was your duty? Was it to enforce the fishery regulations?

A. That was my understanding.

Q. That was the understanding. And did you maintain a patrol there at Karluk in connection with your duties? [389]

A. Yes. We had a little speed boat with a kicker on it.

(Testimony of W. G. Brunskill.)

Q. Were you armed? A. Yes, sir.

Mr. Arnold: That is all.

Redirect Examination

By Mr. Berrett:

Q. Mr. Brunskill, when did you first hear of the temporary injunction?

Mr. Arnold: If the Court please, I object upon the ground that it is immaterial. The temporary injunction speaks for itself. It is not necessary that this witness have notice of it.

The Court: Objection sustained.

Q. (By Mr. Berrett): Mr. Brunskill, on the 22nd day of July, 1946, what occurred that you observed in that area?

A. Mr. Mueller and myself left the village, and we went out into the fishing grounds. It was about five-thirty in the morning. There was a large number of boats fishing out there, or getting ready to fish.

Q. What was your purpose?

A. The purpose that morning was/to see that nobody set out before six o'clock.

Q. That is a particular general regulation applying to all—

A. (Interposing): Fishermen.

Q. —fishermen. What else happened, Mr. Brunskill? Did you [390] talk with any of the fishermen of the defendants?

A. Mr. Mueller * * * (Interrupted).

Q. Of the plaintiffs?

(Testimony of W. G. Brunskill.)

A. Mr. Mueller talked with Mr. Turner. I did no talking myself at all.

Q. Did you overhear the conversation?

A. Yes, part of it.

Q. Can you tell us what it was?

A. Mr. Turner asked if we had heard anything—asked Mr. Mueller—and he stated that he hadn't. That is about all there was to it.

Q. Heard anything in regard to what? Was the subject mentioned?

A. The injunction. The injunction, I presume, was what they were talking about.

Q. Did you observe, in the afternoon of that day, any difference in the place where these fishermen fished?

A. Yes.

Q. What was your observation?

A. They came inside of the markers.

Q. You mean the beach seining area?

A. Yes, that is what I mean, the beach seining area.

Q. Did they continue to fish there in the days following?

A. Yes.

Q. How long did you remain at Karluk?

A. I left Karluk July 30th. [391]

Q. After the 22nd day of July, did you notice that the fishing of these boats inside of the beach seining area interfered with the fishing of the natives?

Mr. Arnold: I object to that as immaterial.

The Court: Objection sustained.

Mr. Berrett: That is all.

Mr. Arnold: That is all, Mr. Bruhskill.

Mr. Berrett: Your Honor, I wish to ask for a continuance at this time, inasmuch as the plane from Anchorage on which our last witness was to have come has not arrived. We have been attempting all morning to get word as to just what hour the plane might leave Anchorage, and we have not received that word. It did not leave at its usual hour. We don't suppose that it would be in this morning from that information. We propose, your Honor, by the introduction of the testimony of this witness, who is Frank Meyer, who is the Fish and Wildlife Agent in the Kodiak region, of which Karluk is one place—we propose to show by his testimony that the industry, the plaintiff companies, had full knowledge of the orders that Mr. Meyer had received; first, to enforce and make a test case, and next not to enforce; that he showed to their agents communications which have been marked here for identification purposes but not admitted as exhibits. We propose to show that general knowledge, in order to establish that the plaintiffs were in no danger whatsoever of loss of property in regard to [392] enforcement of this regulation, and, after laying the foundation with Mr. Meyer, I will again present as exhibits those particular identifications consisting of communications between Mr. Hynes, the defendant in this action, and Mr. Meyer.

Mr. Arnold: If the Court please, we are very reluctant to withhold our cooperation from the government in the trial of this case. We have all lived in this country a long time and know that transpor-

tation schedules are uncertain at best, particularly at this time of the year, although this case has been set for a long time. Mr. Medley and myself and our witnesses came from a great distance, and they have arrived. But, from counsel's own statement, I do not see that a continuance is justified, because I cannot see that the missing witness, the testimony outlined by counsel's statement to be furnished by Mr. Meyer, is admissible or relevant or material to this controversy. What I am trying to say, if the Court please, is that we are reluctant to resist the continuance in this matter, if a material witness is absent, but based upon counsel's own statement. I fail to see the materiality of the evidence of the witness, Mark Meyer, and I do not think any foundation or any basis has been made upon which the Court ought to grant the continuance.

Mr. Medley: I would like to present, if I may, a new thought there, your Honor. It is a well, old, established rule of the law that no agent of the government can bind the [393] government by the statement that he will not prosecute or enforce a regulation. There have been many cases where such a statement has been made, and the proof of that has been objected to and the objection sustained, on the theory that an agent of the government cannot bind the government in such a manner. I have had the unfortunate experience of being thrown out of court on that theory myself, and I am quite familiar with it; and, therefore, so far as the possibility of the prosecution of these fishermen for fishing in that reserve is concerned, any statement of anybody

who has been a witness or suggested as a witness is absolutely immaterial, insofar as the possibility of prosecution is concerned.

Mr. Berrett: If the Court please, I want to refer to paragraph eight in the complaint of the plaintiffs in which they themselves raise the issue and which we denied in our answer. I think, having raised the issue that they were immediately threatened—“Plaintiffs are threatened with an immediate, substantial, and irreparable loss, for which they have no adequate remedy at law, because of defendant's action is closing to them the waters purported to be embraced by the Karluk Indian Reservation and included within said subsection 208.23 (r) of the Alaska Fisheries General Regulations, and because of defendant's threatened action in utilizing the enforcement powers, particularly the seizure powers, under said White Act. Profitable operation of plaintiffs' canneries [394] requires that the supply of salmon which in previous seasons they obtained from said waters be available to them and particularly at this time when the seasonal run of salmon in these particular waters constitutes one of the principal sources of supply for their cannery operations. No other replacement source of such salmon for their canneries at Kodaik Island is available to them.

“Plaintiffs are threatened with an immediate, substantial and irreparable loss for which they have no adequate remedy at law, in the event of seizure of the fish which they will and necessarily must obtain from such waters pur-

ported to be included in the Karluk Indian Reservation and included within said subsection 208.23 (r) of the Alaska Fisheries General Regulations.

“Plaintiffs are further threatened with immediate, substantial, and irreparable loss, for which they have no adequate remedy at law, in the event of seizure of their boats, gear and equipment when and as used in the waters purported to be embraced within the Karluk Indian Reservation and included within the aforesaid subsection 208.23 (r) of the Alaska Fisheries General Regulations because in the event of such seizure they will be utterly unable thereafter to utilize such boats and gear and equipment, not only within the waters purported to be embraced within the said Karluk Indian Reservation, but also in all other fishing areas adjacent to their [395] Kodiak canneries and from which they customarily and necessarily fish in order to operate their canneries at Kodiak Island. Seizure of such boats, gear and equipment will substantially result in completely closing down their salmon canning operations at Kodiak Island.

“Plaintiffs further allege upon information and belief that because the crews of their seine boats are subject to and now threatened with arrest by defendant for alleged violation of the aforesaid subsection 208.23 (r) of the Alaska

Fisheries General Regulation, their fishermen will refuse to enter the waters embraced by said subsection unless immediate relief can be obtained from this Court."

I think, having raised it themselves in their complaint and it having been denied in the answer, that it has become an issue and it is before the Court.

The Court: Motion denied.

Mr. Berrett: If the Court please, I would like at this time to move to strike from the record the questions and answers to which I raised objections at the time in various of the depositions. I think it was the ruling of your Honor that these matters, when the first objection was raised, that the question would be permitted and the answer permitted until all the evidence was in, and then that your Honor would rule upon them and that we would have an opportunity to strike.

I move at this time to strike from the deposition of [396] Howard Bailey in the typed copy of the deposition as follows:

Page 16, line 13; page 16, line 19 and line 25;

Page 18, line 22;

Page 19, lines 1, 3, and 5 and 13;

Page 21, line 22;

Page 22, line 10, line 17, line 19;

Page 23, line 1;

together with the answers to those questions.

In the deposition of Frank E. McConaghy the

questions found in the typed copy of the deposition, as follows:

Page 64, line 2, line 7, line 17, line 19, line 23;

Page 65, line 5, line 8, line 10, line 12;

together with the answers thereto.

In the deposition of F. A. Gepner, the questions found in the typed copy of the deposition as follows:

Page 87, line 18; page 88, line 7;

together with the material to the bottom of page 91, which is a portion of the answer thereto.

In the deposition of George W. King, the questions found in the typed copy of the depositions, as follows:

Page 127, line 10, line 20, line 24;

Page 128, line 2, line 8, line 11;

together with the answers recorded thereto.

All of these questions, your Honor, have to do with the alleged threat to the property of the plaintiffs prior to the [397] time when the fisheries' regulation, section 208.23 (r) was promulgated and could only go to actions taken by the village of Karluk who are not made defendants in this action and which involves the United States as guardians of those Indians who are not made party defendant in this action.

Hence I object to them and move that they be struck from the record on the grounds that they are immaterial, incompetent, and irrelevant.

Mr. Medley: If your Honor please, in answer to counsel, when this deposition was read, all objec-

tions, we supposed, that were to be made were made. We have no objection to striking from the record any question and answers which were objected to at the time the depositions were read and sustained by the court. We think that counsel has waived his right to raise any new questions by not objecting at the time the depositions were offered and accepted. They are in the evidence, and this is an improper time to move to strike anything from them, except such objections that were made at the time they were offered and sustained by the court.

The Court: I will take the matter under advisement.

Mr. Berrett: The defendant rests.

Mr. Arnold: No rebuttal, if the Court please.

The Court: Are you ready to proceed with the arguments now?

Mr. Arnold: We are ready. [398]

(Argument was presented by respective counsel, after which the Court took the matter under advisement.)

(Court was duly reconvened at two o'clock P. M., October 31, 1946, at which time the following proceedings took place in this cause:)

The Court: In the case of Grimes Packing Company against Hynes, the motion of the defendant to strike certain portions of the depositions of witnesses, which motion was made near the close of the defendant's case, is granted. The Court now finds in favor of the plaintiffs on all of the issues joined, and you may draw your findings accordingly.

I, Muriel Anderson Lomen, of Fairbanks, Alaska, hereby certify:

That I am the official court reporter in the District Court for the Territory of Alaska, Fourth Division; that I attended the trial of the cause entitled, "Grimes Packing Co., et al., v. Frank Hynes, etc., No. 5505," at Fairbanks, Alaska, on October 29 and 30, 1946, and took down in shorthand the testimony given and proceedings had thereat; that I thereafter transcribed said shorthand, and the foregoing pages, numbered 1 to 320, inclusive, comprise a full, true, and correct statement and transcript of such testimony and proceedings.

Dated at Fairbanks, Alaska, this 26th day of December, 1946.

MURIEL ANDERSON LOMEN,
Court Reporter.

PLAINTIFF'S EXHIBIT A

Alaska Salmon Industry, Inc. United Fishermen of Alaska—Kodiak Island FISH PRICE AGREEMENT

10/18/46

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Frank Hynes vs.

	1940 Rate (Each)	1941 Rate (Each)	1942 Rate (Each)	1943, 1944 1945 Rate (Each)	1946 Rate (Each)
Fishermen using Company gear:					
King Salmon	\$0.50	\$0.50	\$0.66 $\frac{2}{3}$	\$0.71	\$1.00
Red Salmon .....	.15 $\frac{3}{4}$	.17	.20	.214	.30
Pink Salmon .....	.03 $\frac{1}{2}$	.03 $\frac{3}{4}$	.05	.0535	.07
Chum Salmon .....	.05	.05 $\frac{1}{2}$	.07	.0749	.11 $\frac{1}{3}$
Silver Salmon .....	.08 $\frac{1}{2}$	.09	.12	.1284	.26 $\frac{2}{3}$
Kings, under 15 lbs. ....	.25	.25	.33 $\frac{1}{3}$	.35 $\frac{2}{3}$	.....
Fishermen using own gear:					
King Salmon .....	.75	.75	1.00	1.07	1.50
Red Salmon .....	.23 $\frac{1}{2}$	.25 $\frac{1}{4}$	.30	.321	.45
Pink Salmon .....	.05	.05 $\frac{1}{4}$	.07 $\frac{1}{2}$	.0803	.10 $\frac{1}{2}$
Chum Salmon .....	.08	.08 $\frac{1}{2}$	.10 $\frac{1}{2}$	.1124	.17
Silver Salmon .....	.12 $\frac{1}{2}$	.13	.18	.1926	.40
Kings, under 15 lbs. ....	.37 $\frac{1}{2}$	.37 $\frac{1}{2}$	.50	.53 $\frac{1}{2}$	.....

[Endorsed]: Filed April 17, 1947. [401]

PLAINTIFF'S EXHIBIT B

In reply refer to

United States Department of the Interior
Office of the Solicitor
Counsel at Large
Juneau, Alaska

July 4, 1944

Kadiak Fisheries,
412 Lowan Bldg.,
Seattle, Wash.

Gentlemen:

According to information received from competent witnesses, your boats numbered 8, 120, 122 and 123 fished illegally between June 16 and July 6 within the restricted area of the Karluk Indian Reserve established by authority of the act of Congress of May 1, 1936, 48 U. S. C. A. 358a. Since you are undoubtedly aware of the serious sanctions applicable in cases of this kind, it is presumed that this was done without your knowledge or consent. Accordingly, before requesting the law enforcement officers of the federal government to take action, I should like to know whether you propose to take any measures to prevent a repetition of this offense by any of your boats.

Very truly yours,

/s/ GEORGE W. FOLTA,
Counsel at Large.

PLAINTIFF'S EXHIBIT C

1946 May 27 2 28

KB27 ZEA18 KZEK5

UKS V KZEK NRA32 110/109 Paid Nightletter

Kodiak Alaska May 26 1946

W C Arnold 6868

Alaska Salmon Industry Inc

Dexter Horton Bldg Seattle Wash

Following received by Meyer from Hynes Saturday Quote In order clarify regulation 20823R which prohibits fishing in waters Kodiak Reservation except by natives in possession thereof and persons authorized by said natives you are directed to arrange for test case on first day season opens packers have declared intention to fish in reservation contrary to provisions of regulations therefore will welcome early court decision discuss matter with US attorney and commissioner and advise course action you propose to take unquote As I recall this contrary previous arrangement and if this now the plan thought preliminary steps best be taken by you and home office of the companies advise

CULBERTSON

2210Z

[Stamped Alaska Salmon Industry Inc May 27 9 25 am 46.] [403]

PLAINTIFF'S EXHIBIT D

Kadiak Fisheries Company

Port Bailey Cannery

October 15, 1946

1. The total catch of fish by species taken by all types of gear:

	Coho	Chum	Pink	King	Red	Total
1941	29275	78805	1676310	1535	331484	2117409
*1942	15521	172650	1194575	789	237028	1620563
*1943	14188	126018	2374969	858	378277	2894310
*1944	8627	137638	1303508	683	361733	1812189
*1945	14443	136584	2005762	1889	454832	2613510
*1946	6347	86956	2118022	422	118179	2329926

2. The total pack (computed in one pound tall cases) for each of the years stated above:

	Coho	Chum	Pink	King	Red	Total
1941	3253	7976	86635	181	22448	120493
*1942	1456	20123	61316	116	13844	96855
*1943	1192	11179	98935	105	23789	135200
*1944	849	13717	76124	68	24689	115447
*1945	1402	12772	90573	192	32195	137134
*1946	483	7920	101893	25	7962	118283

*Includes joint trap operation with Pacific American Fisheries, Inc.

3. The total catch of fish taken within the area now included in the Karluk Indian Reservation during the years specified above:

	Coho	Chum	Pink	King	Red	Total
1941	1058	632	9893	134	59958	71675
1942	397	14556	225323	57	58042	298375
1943	83	825	2380	161	60273	63722
1944	33	5803	219360	69	63535	288740
1945	4	150	554	84	50907	51699
1946	137	8660	1024596	44	25381	1058818

4. The total pack (in one pound tall cases) computed as near as possible and which was derived from the fish taken within the area now covered by the Karluk Indian Reservation during the years mentioned above:

	Coho	Chum	Pink	King	Red	Total
1941	118	64	517	16	4178	4893
1942	35	1484	11144	7	3328	15998
1943	9	73	103	19	3932	4136
1944	4	592	12812	8	4267	17683
1945		14	24	10	3649	3697
1946	15	787	51358	5	1717	53882

PLAINTIFF'S EXHIBIT E

United States Department of the Interior
Office of Indian Affairs

Karluk, Alaska, June 29, 1946

Mr. Frank McConaghy

Kodiak, Alaska

My dear Mr. McConaghy:

Attached hereto is a letter addressed to the Postmaster at Kodiak authorizing delivery to you of any mail held there pending transmittal to Karluk. Would it be too much of an imposition to forward this mail to us via the first convenient tender boat.

We were advised by wire yesterday of the temporary restraining order issued by the District Federal Court at Fairbanks but our instructions were not altered so we will remain on duty here pending the outcome of the hearing set for July 8 at Fairbanks.

Thanking you for your assistance in the premises and with very kindest personal regards we beg to remain,

Sincerely yours

/s/ LOUIS C. MUELLER

Chief Special Officer

/s/ W. G. BRUNSKILL

Special Officer

PLAINTIFF'S EXHIBIT F

Frank McConaghy & Co., Inc., Kodiak, Alaska
 Re: Alaska Salmon Industry
 Letter Oct. 4, 1946

1. Total Catch

Year	Reds	Pinks	Chums	Cohoos	Kings	Total
1941						
1942	41,968	231,897	34,489	15,805	29	324,188
1943	124,674	511,066	41,347	4,497	94	681,678
1944	128,757	302,635	37,941	281	56	469,670
1945	103,060	475,176	65,563	5,438	40	649,277
1946	24,403	747,404	43,261	397	24	815,489
Total	422,862	2,268,178	222,601	26,418	243	2,940,302

2. Total Pack 48/#1 Talls

Year	Reds	Pinks	Chums	Cohoos	Kings	Total
1941	3,530 es	16,183 es	1,142 es	3,269 es		24,124 es
1942	1,802	9,637	4,112	1,899		17,450
1943	6,865	16,964	2,939	397	12	27,177
1944	7,646	16,421	3,398	15		27,480
1945	7,234	19,902	5,755	685		33,576
1946	4,502	31,808	3,838	10		37,158
Total	28,579	110,915	21,184	6,275	12	166,965

3. Total Catch (Karluk Indian Reservation)

Year &	Reds	Pinks	Chums	Cohoes	Kings	Total
1941						
1942	28,694	73,737	4,346	3,169	24	109,970
1943	99,928	4,571	20,325	824	86	125,734
1944	28,841	88,085	3,179	19	51	120,175
1945	45,743	6,300	756	4,418	31	57,248
1946	12,304	514,535	1,829	13	17	528,598
Totals	215,510	687,228	30,435	8,443	209	941,725

4. Total Pack 48/#1 Talls (Karluk Indian Reservation)

1941						
1942	1,195	2,451	367	326		4,339 es
1943	5,851	199	1,694	75	12	7,831
1944	1,802	4,894	299	2		6,997
1945	3,192	274	68	551		4,085
1946	689	21,464	466	1		22,320
Total	12,729	29,282	2,594	955	12	45,572

Note: Figures not available for 1941 other than the total pack.

PLAINTIFF'S EXHIBIT G

An Ordinance

Whereas, under Public Land Order 128, of May 22, 1943, creating the Karluk Reservation, the right to fish commercially in the waters of said reservation is restricted to the inhabitants of the Native Village of Karluk and vicinity, and;

Whereas, non-residents desire to continue their fishing operations in the waters of said reservation;

Now, Therefore, be it ordained by the Council of the Native Village of Karluk, a federal corporation chartered under the Act of June 18, 1934, as amended;

Section 1. That it shall be unlawful for any person, partnership, firm, association or corporation, to fish for, take or catch any fish, or to operate any fishing vessel, gear or equipment, within the waters of the Karluk Reservation except under a permit issued by the Native Village of Karluk, for which the fee shall be as follows:

(A) For residents of the Territory of Alaska \$1.00

(B) For non-residents of the Territory of Alaska \$25.00

Provided further, that a person to qualify for a resident (Class A) permit must have resided in the Territory of Alaska for three consecutive years prior to the date of their application, or request, for a permit.

Section 2. The possession of fish upon any vessel within said waters without a permit shall constitute prima facie evidence of a violation of this ordinance.

Section 3. Any violation of this ordinance shall be punished by a fine of not exceeding Five Hundred Dollars (\$500.)

Section 4. This ordinance shall take effect and be in force from and after the 31st. day of May, 1945.

Approved this 31st day of May, 1945.

/s/ LARRY ELLANAK

President Native Village of
Karluk, Alaska

/s/ JACOB LAKTONEN, Sr.

Sect. & Treas. Native Village
of Karluk, Alaska [407]

Application for 1945 Commercial Fishing Permit
Karluk Reservation, Alaska

I, hereby make application for () resident, () non-resident, permit to fish in the waters of the Karluk Reservation, Alaska, in compliance with an Ordinance passed by the Native Council of the Village of Karluk dated May 31, 1945, copy of which has been furnished me.

Date

.....
Applicant's Signature

My boat number or name is

I am fishing for (Name and address of packer or cannery) [408]

PARKS CANNING CO. Inc.

0224

DATE June 13 1946

Howard Elliott

40.00

REGISTERED
RE-4823 \$40 AND 00 CTS

BANK OF KODIAK
KODIAK, ALASKA

PARKS CANNING CO. Inc.

E. W. Egan

Affred E. Hammond

Hand to Lewis, Rockford

OR
NO PROTEST

Pay to the order of
SEATTLE-FIRST NATIONAL BANK

JUL 2 1948

1948

— 24 —

NO FURTHER

10

4

An Ordinance

Whereas? under Public Land Order 128, of May 22, 1943, creating the Karluk Reservation the right to fish commercially in the waters of said reservation is restricted to the inhabitants of the Native Village Karluk and vicinity, and

Whereas, non-residents desire to continue their fishing operations in the waters of said reservation;

Now, Therefore, be it ordained by the Council of the Native Village of Karluk, a federal corporation chartered under the Act of June 18, 1946 as amended;

Section 1. That it shall be unlawful for any person, partnership, firm association or corporation, to fish for, take or catch any fish, or to operate any fishing gear, vessel or equipment, within the waters of the Karluk Reservation except under a permit issued by the Native Village of Karluk, for which the fee shall be as follows:

(A) For residents of the Territory of Alaska \$2.00

(B) For non-residents of the Territory of Alaska \$40.00

Provided further that a person to qualify for a resident (Class A) permit must have resided in the Territory of Alaska for three consecutive years prior to the date of their application, or request, for a permit.

Section 2. The possession of fish upon any vessel within said waters without a permit shall constitute prima facie evidence of a violation of this ordinance.

Section 3. Any violation of this ordinance shall be punished by a fine of not exceeding \$500.

Section 4. This ordinance shall take effect and be in force from and after the 31st. day of May, 1946.

Approved this 30th. day May, 1946.

/s/ EVAN MOSES NAUMOFF

President Native Village of
Karluk, Alaska

/s/ ALFRED NAUMOFF

Sect. & Treas., Native Village
of Karluk, Alaska [411]

Commercial Fishing Permit

Permit No. 021 In Triplicate

[x] Non resident

Karluk Indian Reservation, Karluk, Alaska, June 15, 1946.

Pursuant to an Ordinance passed by the Council of the Native Village of Karluk, Alaska, dated May 31, 1946, permission is hereby given by the Native Village of Karluk to Howard Elliott of Seattle, Wash., to enter the waters and land of the Karluk Reservation for the purpose of engaging in commercial fishing for Salmon P. C. Co. during the period: June 1946 to September 1946.

This permit is issued subject to the conditions printed on the back hereof.

/s/ EVAN M. NAUMOFF

President Karluk

Approved:

/s/ H. C. BINGHAM

Asst. Teacher A.N.S.

I accept:

/s/ HOWARD ELLIOTT

Permittee, Boat No. or Name: Parks No. 1, Fishing for: Parks Canning Co., Uyak Bay. [412]

PLAINTIFF'S EXHIBIT I

Letterhead Parks Canning Co., Inc.

Data for Depositions in Karluk Case—Oct. 18, 1946

Year	Red	Coho	Chum	Pink	King	Total
(1) Total catch of fish by Species—All types of gear						
1941	306,287	4,490	58,584	664,724	155	1,034,240
1942	197,710	3,356	89,031	319,374	67	609,538
1943	369,486	944	57,295	919,385	218	1,387,328
1944	396,776	282	79,302	469,817	123	946,300
1945	381,904	301	85,766	756,500	108	1,223,979
1946	100,813	917	31,371	1,074,086	70	1,207,257
	1,752,376	10,290	401,349	4,203,886	741	6,368,642
(2) Total Pack by Species (Basis of 48/1 # talls)						
1941	21,054	517	5,207	32,719	20	59,517
1942	12,801	338	8,813	14,536	0	36,488
1943	24,547	84	5,287	40,715	33	70,666
1944	27,411	20	8,420	27,447	0	63,298
1945	28,092	28	7,896	33,326	0	69,342
1946	7,178	82	2,815	50,732	0	60,807
	121,083	1,069	38,438	199,475	53	360,118

Year

(3) Total catch of fish by Species in area now included in Karluk reservation.

	Red.	Coho	Chum	Plnk	King	Total
1941	30,924	2,067	12,865	114,851	71	160,778
1942	28,610	2,526	12,318	131,149	17	174,620
1943	40,038	29	2,005	46,988	137	89,197
1944	74,469	84	14,011	262,735	82	352,381
1945	41,910	0	53	554	78	42,595
1946	17,694	52	2,554	630,430	38	650,768
	233,645	4,758	43,806	1,187,707	423	1,476,339

(4) Total Pack by Species (Basis of 48/1# talls) from Karluk reservation. Approximate figures computed from total catch of fish in Karluk reservation as listed above.

1941	2,127	238	1,143	5,652	9	9,169
1942	1,853	254	1,344	6,147	0	9,568
1943	2,660	2	184	2,081	21	4,948
1944	5,244	6	1,487	15,441	0	22,178
1945	3,088	0	5	24	0	3,117
1946	1,260	4	229	29,779	0	31,272
	16,232	504	4,392	59,094	30	80,252

PLAINTIFF'S EXHIBIT J

Parks Canning Co., Inc. Uyak Cannery

Boats and Crews that fished in Karluk Reservation
1946 Season

Co. Boats

Parks No. 2—Paul Bayou, Chas. W. Anderson,
William Bayou.Betty Jeanne—Paul Bayou, Chas. W. Anderson,
(William Bayou, George Heitman).Parks No. 4—Eino Pasma, Alfred Streich, (Jacob
Laktonen Jr., Edwin Hovey).Parks No. 5—Victor Jarvi, Henry Haataja, Wil-
lard Haataja.Parks No. 7—Frank Kilpatrick, Norman Blake,
Arthur Kilpatrick.

Indep. Boats

Parks No. 1—Howard Elliott, Fred Fagerud, Imo
Trueman.Parks No. 3—William Katelnikoff, John Katekni-
koff, Jr., (Ted Pestrikoff, Lester Knagin, Pete
Katelnikoff).

Betty Lou—Charles Harmon, James T. Johnson.

Lola C.—Ervine Taylor, H. A. Brusco, Gerald
Phillips, Roy Holland.Peggy L.—Tom Taylor, Edwin Hovey, James W.
Johnson, John Lont.

Seashell—Alex Panamaroff, John Waselié. [414]

PLAINTIFF'S EXHIBIT K

Letterhead San Juan Fishing & Packing Co.

San Juan Fishing & Packing Co., Uganik Bay, Alaska

Total Catch of Fish by Species & Types of Gear

1941

	Reds	Cohoe	Pinks	Chums	Kings	Total
Purse seines	15571	472	331938	55514	40	395535
Beach seines	22560	22	12514	359	107	35562
Traps	179415	24005	1832632	74145	2292	2112489
	217546	25499	2177084	130018	2439	2543586

1942

Purse seines	3265	22	74849	5988	9	104133
Beach seines	37999	96	255229	227	194	293745
Traps	49503	15047	669251	95921	605	830427
	90767	15165	999329	122136	808	1228305

1943 (Consolidation with APA)

	Reds	Cohoe	Pinks	Chums	Kings	Total
Purse seines	13575	43	228175	24645	23	266461
Beach seines	147965	1805	70560	2303	309	222942
Traps	65788	14093	1926423	95041	213	2101588
	227328	15941	2225158	121989	545	2590961

1944 (Consolidation with APA)

	Reds	Cohoe	Pinks	Chums	Kings	Total
Purse seines	48315	69	236810	20812	79	306085
Beach seines	125676	66	267890	446	361	394439
Traps	42686	10264	580624	86061	292	719871
	216677	10399	1085324	107319	732	1420395

1945 (Consolidation with APA)

	Reds	Cohoe	Pinks	Chums	Kings	Total
Purse seines	56626	82	415241	42295	62	514306
Beach seines	81043	9	2856	57	302	84267
Traps	68973	13956	1594977	119645	833	1798384
	206642	14047	2013074	161997	1197	2396957

1946 (Consolidation with Uganik Fisheries)

	Reds	Cohoe	Pinks	Chums	Kings	Total
Purse seines	32139	245	1350555	36133	54	1419047
Beach seines	7639	2	320	9	87	8057
Traps	40515	14000	1099975	59219	317	1228020
	80293	14247	2450850	95361	458	2655124

Total Pack—San Juan, Uganik Bay, Alaska

1941	13396	2310	101551	11698	316	129271
1942	5311	1782	52703	14461	145	74402
1943*	10888	1089	93498	9017	115	114607
1944*	14421	1068	61641	10856	128	88114
1945*	14588	1732	87802	13618	180	117920
1946**	4478	1306	105238	7182	57	118261

Note: *1943, 1944, 1945, consolidation with Alaska Packers Ass'n at Larsen Bay.

**1946, consolidation with Uganik Fisheries.

Catch of Fish in Karluk Reservation Area

	Reds	Cohoe	Pinks	Chums	Kings	Total
1941	32744	25	2835	185	85	35874
1942	40703	101	261948	436	199	303287
1943	110766	452	66178	6865	327	184588
1944	161045	134	376776	3201	429	541585
1945	116990	24	11966	192	339	129511
1946	26641	95	519095	265	110	546206

Pack of Fish Derived from Fish Taken in Karluk Reservation Area

	Reds	Cohoe	Pinks	Chums	Kings	Total
1941	1973	2	1417	16	10	3418
1942	2465	11	13097	54	22	15649
1943	6922	43	3008	572	38	10583
1944	10390	10	27725	401	62	38588
1945	7557	3	498	16	40	8114
1946	1665	9	22569	24	16	24283

PLAINTIFF'S EXHIBIT L

Letterhead Uganik Fisheries, Inc.

Total Catch of Fish by Species & Types of Gear

	Reds	Cohoe	Pinks	Chums	Kings	Total
1941						
Purse seines	12606	106	244521	55137	29	312399
Gill nets	24350	82	26015	1924	14	52385
Traps	42830	9213	458906	26606	741	538296
	<u>79786</u>	<u>9401</u>	<u>729442</u>	<u>83667</u>	<u>784</u>	<u>903080</u>
1942						
Purse seines	2449	40	23087	19434	1	45001
Gill nets	9571	36	6168	1114	3	16892
Traps	28166	6469	336176	34329	683	405823
	<u>40176</u>	<u>6545</u>	<u>365421</u>	<u>54877</u>	<u>687</u>	<u>467716</u>

Grimes Packing Co., et al.

	Reds	Cohoe	Pinks	Chums	Kings	Total
1943						
Purse seines	2163	8	147603	4733	.....	154507
Gill nets	14925	175	19772	2916	6	37794
Traps	38136	8476	584793	26346	225	657976
	<u>55224</u>	<u>8659</u>	<u>752168</u>	<u>33995</u>	<u>231</u>	<u>850277</u>
1944						
Purse seines	16527	35	287920	39055	23	343660
Gill nets	6868	23	9884	1315	11	18101
Traps	13833	3768	226734	20653	70	265058
	<u>37328</u>	<u>3826</u>	<u>524538</u>	<u>61023</u>	<u>104</u>	<u>626819</u>
1945						
Purse seines	15178	26	264379	21405	5	300993
Traps	30608	9045	553917	39083	780	633433
	<u>45786</u>	<u>9071</u>	<u>818296</u>	<u>60488</u>	<u>785</u>	<u>934426</u>

Note: 1946 catch of fish canned in consolidation with San Juan Fishing & Packing Co.

	Reds	Cohoe	Pinks	Chums	Kings	Total
Total Pack Uganik Fisheries, Uganik Bay, Alaska						
1941	5729	1023	39437	8010	130	54329
1942	2491	634	18561	6207	118	28011
1943	3719	726	35458	3055	82	43040
1944	2485	397	28398	6053	19	37352
1945	3641	787	35314	5521	130	45393

Catch of Fish in Karluk Reservation Area						
1941	5160	.....	11	72	10	5253
1942	28	4	1316	2	.....	1350
1943	2045	.....	20	25	.....	2090
1944	10910	.....	1924	354	23	13211
1945	8658	.....	5303	.....	4	13965
1946 .....	.....	.....	.....	.....	.....	.....

Pack of Fish Derived from Fish Taken in Karluk Reservation Area						
1941	312	.....	.....	6	1	319
1942	2	.....	65	.....	.....	67
1943	122	.....	1	2	.....	125
1944	704	.....	111	44	2	861
1945	558	.....	221	.....	.....	779
1946 .....	.....	.....	.....	.....	.....	.....

Note: 1946 catch of fish canned in consolidation with San Juan Fishing & Packing Co.

PLAINTIFF'S EXHIBIT M

Kodiak Island, Alaska

STATEMENT OF FISH CAUGHT AND PACKED—1941-1946, INC.

Karluk Area Only	Pinks	Reds	Chumns	Kings	Savers	Total
Fish Caught						
1941	20	8883	137	56	1	9097
1942	1	3677				3678
1943 (A)	20	26872	525			27417
1944	105855	52078	975	10	15	158933
1945	23	44369	17	41		44450
1946 (B)	551698	8537	36	9	21	560301
Cases Packed—48/1# Basis						
1941	1	668	16	6		691
1942		268				268
1943 (A)	1	1724	54			1779
1944	6188	3784	96		2	10070
1945	1	3164	1	9		3175
1946	26703	665	3		4	27375

Moser Bay Cannery—All
Areas Combined

Fish Caught

	Pinks	Reds	Chums	Kings	Silvers	Total
1941	509350	129212	45534	104	3363	687563
1942	532293	158095	14828	22	431	705669
1943 (A)	976536	226657	7487		127	1210807
1944	382029	352895	12057	34	201	747216
1945	1138724	333118	13694	135		1485671
1946 (B)	859148	247594	15273	50	149	1122214

Cases Packed—48/1# Basis

	Pinks	Reds	Chums	Kings	Silvers	Total
1941	27066	9715	5464	11	332	42588
1942	26957	11515	1735		59	40266
1943 (A)	41008	15006	804		13	56831
1944	22331	25640	1190		30	49191
1945	47279	23754	1226	19		72278
1946	41584	19290	1287	1	33	62195

(A)—Moser Bay Cannery did not operate in 1943—Catch by Moser Bay fishermen packed under joint operation agreement as follows:

At Parks Canning Co.
Uyak Bay

	Pinks	Reds	Chums	Kings	Silvers	Total
Fish Caught	35	125383	531			125949
Cases Packed	2	8047	55			8104
At Pacific American Fisheries—Alltak						
Fish Caught	976501	101274	6956		127	1084858
Cases Packed	41006	6959	749		13	48727

(B)—In addition to the number of fish caught in 1946 reported above, the following number of fish were caught by Moser Bay fishermen in the Karluk area, delivered to the Moser Bay Cannery, transferred by our cannery tender to, sold to and packed by American Fisheries, Alltak:

39951 484 40435

The total fish caught and delivered to Moser Bay Cannery in 1946 is as follows:

Karluk Area Only	591649	9021	36	9	21	600736
Moser Bay Cannery— All Areas Combined	899099	248078	15273	50	149	1162649

PLAINTIFF'S EXHIBIT N

Office of War Information
Office of Price Administration

Advance Release:

OPA-T-282

For Tuesday Morning Papers,
November 10, 1942.

Moving to iron out wide variations between individual sellers' March, 1942, ceilings on canned salmon, the Office of Price Administration today set specific dollars and cents maximum prices on canned salmon at the packer level.

The new industry-wide ceilings reflect a price close to the average March ceilings reported by the nation's salmon canners.

Maximum Price Regulation No. 265 (Sales by Canners of Salmon) becomes effective in the Continental United States and the District of Columbia November 9, 1942, and in the territories and possessions of the United States November 19. Except in a few cases where March ceilings were inadequate, the new packer order on salmon will not change ceiling prices for either wholesalers or retailers. Distributors will continue to be governed by the General Maximum Price Regulation at the individual seller's top March prices or—where inadequate—by special formulas in Maximum Price Regulation No. 237 for wholesalers and in Maximum Price Regulation No. 238 for retailers.

The new canner ceilings will reflect a price generally compatible with the maximum prices per-

Plaintiff's Exhibit N—(Continued)

mitted to be paid by both Government agencies in their acquisitions for the armed forces and by the private trade.

The regulation permits the Government to continue to buy in a stabilized pricing zone. Federal purchases for the military arm—already largely completed—may aggregate 60 per cent of the entire 6,000,000-case 1942 salmon pack:

OPA officials emphasized that ceilings set are higher than the average 1941 salmon prices, thus affording a fair return to the canner in light of his increased costs.

Although the five main salmon canning regions in the United States are the Columbia River, Puget Sound, southeastern Alaska, central Alaska and western Alaska, the new regulation does not cover canned salmon from the Columbia River. This will be handled later by separate regulation.

The Columbia River types of salmon usually bring better prices because of the superior quality although constituting a minor portion of the \$40,-250,000 ten-year average value of the total salmon pack.

By means of a separate regulation, industries operating in the Columbia River will be afforded relief that will be equitable and in keeping with the Emergency Price Control Act of 1942:

Following tabulation indicates some of the new ceiling prices set per case f.o.b. car Seattle, Wash-

Plaintiff's Exhibit N—(Continued)

ington, for salmon canned in the territory outside of the continental United States (where most of the pack is stored after arrival from Alaska), and at the shipping point nearest cannery for salmon canned in this country:

Variety	Style of container	Price per case
Chinook	1½-lb. flats	\$12
Red	1-lb. talls	15
Pink	1-lb. talls	8
Chum	1-lb. talls	7.60
Alaska sockeye	1-lb. talls	15
Puget Sound sockeye...	1-lb. talls	18

These maximums are gross prices and the seller must deduct therefrom his customary allowances, discounts and differentials to purchasers of different classes.

On salmon canned and sold for consumption in Alaska, the new regulation provides that prices shall be f. o. b. Seattle, less 50 cents per case.

(Document No. 6975)

Part 1364—Fresh, Cured, and Canned

Meat and Fish

(MPR 265)

Sales by Cannerymen of Salmon

In the judgment of the Price Administrator the prices of salmon have risen to an extent and in a manner inconsistent with the purposes of the Emer-

Plaintiff's Exhibit N—(Continued)

gency Price Control Act of 1942. The Price Administrator has ascertained and given due consideration to the prices of salmon prevailing between October 1, 1941 and October 15, 1941; and has made adjustments for such relevant factors as he has determined and deemed to be of general applicability. So far as practicable, the Price Administrator has advised and consulted with representative members of the industry which will be affected by this regulation.

In the judgment of the Price Administrator, the maximum prices established by this regulation are and will be generally fair and equitable, and will effectuate the purposes of said Act. A statement of the considerations involved in the issuance of this regulation has been issued simultaneously herewith and has been filed with the Division of the Federal Register.*

The maximum prices established herein are not below the average price of such commodities in the year 1941.

Therefore, under the authority vested in the Price Administrator by the Emergency Price Control Act of 1942, as amended, and Executive Order No. 9250, Maximum Price Regulation No. 265 is hereby issued.

*Copies may be obtained from the Office of Price Administration.

Plaintiff's Exhibit N—(Continued)

Authority: §§ 1364.551 to 1364.562 inclusive, issued under Pub. Laws 421 and 729, 77th Cong.; E.O. 9250, 7 F.R. 7871.

§ 1364.551 Prohibition Against Dealing in Salmon at Prices Above the Maximum. On or after November 9, 1942, regardless of any contract, agreement or other obligation, no canner, or agent or other person acting on behalf, or under control, of such canner shall sell or deliver any salmon, and no person in the course of trade or business shall buy or receive from a canner any salmon at prices higher than those set forth in Appendix A hereof, incorporated herein as § 1364.562; and no person shall agree, offer, solicit, or attempt to do any of the foregoing. The provisions of this section shall not be applicable to sales or deliveries of salmon to a purchaser if prior to 1942, such salmon has been received by a carrier, other than a carrier owned or controlled by the seller, for shipment to such purchaser.

§ 1364.552 Conditional Agreement. No canner of salmon shall enter into an agreement permitting the adjustment of the prices to prices which may be higher than the maximum prices provided by § 1364.562 in the event that this Maximum Price Regulation No. 265 is amended or is determined by a court to be invalid or upon any other contingency: Provided, That if a petition for [421] amendment has been duly filed, and such petition requires extensive consideration, the Administrator may grant

Plaintiff's Exhibit N—(Continued)

an exception from the provisions of this section permitting the making of contracts adjustable upon the granting of the petition for amendment.

§ 1364.553. **Export Sales.** The maximum price at which a person may export salmon shall be determined in accordance with the provisions of the Revised Maximum Export Price Regulation¹ issued by the Office of Price Administration.

§ 1364.554 **Less than Maximum Prices.** Lower prices than those set forth in § 1364.562 may be charged, demanded, paid, or offered.

§ 1364.555 **Evasion.** The price limitations set forth in this Maximum Price Regulation No. 265 shall not be evaded, whether by direct or indirect methods, in connection with an offer, solicitation, agreement, sale, delivery, purchase, or receipt of, or relating to salmon, alone or in conjunction with any other commodity, or by way of any commission, service, transportation, or other charge, or discount, premium, or other privilege, or by tying-agreement or other trade understanding, or by changing the selection of style or processing of the canning, wrapping or packaging of salmon.

§ 1364.556 **Records and Reports.** (a) Every person making a purchase or sale of salmon in the course of trade or business, or otherwise dealing therein, after November 8, 1942, shall keep for in-

¹7 F.R. 5059, 7242, 8829.

Plaintiff's Exhibit N—(Continued)

spection by the Office of Price Administration for so long as the Emergency Price Control Act of 1942 as amended remains in effect, complete and accurate records of each such purchase or sale, showing the date thereof, the name and address of the buyer and of the seller, the price contracted for or received, the quantity and description of the grade or brand, style of pack, and container size of salmon.

(b) Such person shall submit such reports to the Office of Price Administration and keep such other records in addition to or in place of the records required in paragraph (a) of this section as the Office of Price Administration may from time to time require.

§ 1364.557 Enforcement. (a) Persons violating any provision of this maximum Price Regulation No. 265 are subject to the criminal penalties, civil enforcement actions, and suits for treble damages provided for by the Emergency Price Control Act of 1942, as amended.

(b) Persons who have evidence of any violation of this Maximum Price Regulation No. 265 or any price schedule, regulation, or order issued by the Office of Price Administration or of any act or practices which constitute such a violation are urged to communicate with the nearest district, state, or regional office of the Office of Price Administration or its principal office in Washington, D. C.

§ 1364.558 Petitions for amendment. Any per-

Plaintiff's Exhibit N—(Continued)

son seeking an amendment of any provision of this Regulation No. 265 may file a petition for amendment in accordance with the provisions of Revised Procedural Regulation No. 1² issued by the Office of Price Administration.

§ 1364.559 Applicability of General Maximum Price Regulation.³ The provisions of this Maximum Price Regulation No. 265 supersede the provisions of the General Maximum Price Regulation with respect to sales and deliveries for which maximum prices are established by this regulation.

§ 1364.560 Definitions. (a) When used in this Maximum Price Regulation No. 265 the term:

(1) "Person" includes an individual, corporation, partnership, association, any other organized group of persons, legal successor or representative of any of the foregoing, and includes the United States, any agency thereof, any other government, or any of its political subdivisions, and any agency of the foregoing.

(2) "Canner" means a person who preserves salmon by processing and hermetically sealing in metal containers.

²⁷ F.R. 8961.

³⁷ F.R. 3153, 3330, 3666, 3990, 3991, 4339, 4487, 4659, 4738, 5027, 5276, 5192, 5365, 5445, 5565, 5484, 5775, 5783, 5784, 6058, 6081, 6007, 6216, 6615, 6784, 6939, 7993, 7322, 7454, 7758, 7913, 8431.

Plaintiff's Exhibit N—(Continued)

(3) "Salmon" means any canned fish of the genus *Oncorhynchus* or of the species *Salmo gairdneri*, except where same is canned along the Columbia River.

(4) "Red" salmon includes Red, Blueback, Quinault, Alaska Sockeye and Puget Sound Sockeye (*Oncorhynchus merka*).

(5) "Coho" salmon includes Coho, Silver, and Silverside (*Oncorhynchus kisutch*).

(6) "Pink" salmon includes Pink and Humpback (*Oncorhynchus gorbusche*).

(7) "Chinook" salmon includes Chinook, Spring, King, Tyee, and Quinmat (*Oncorhynchus tshawytscha*).

(8) "Chum" includes Chum and Dog (*Oncorhynchus Keta*).

(9) "Price per case" means the price for 48 cans of salmon packed for shipment in the usual container.

(10) One pound "tall" means a can 301 x 411.

(11) One pound "flat" means a can 401 x 211.

(12) One-half pound "flat" means a can 307 x 201.25.

(b) Unless the context otherwise requires, the definitions set forth in section 302 of the Emergency Price Control Act of 1942 shall apply to other terms used herein.

Plaintiff's Exhibit N—(Continued)

§ 1364.561 Effective date. This Maximum Price Regulation No. 265 (§§ 1364.551 to 1364.562, inclusive) shall become effective November 9, 1942, in the continental United States and the District of Columbia, and November 19, 1942, in the territories and possessions of the United States.

§ 1364.562 Appendix A: Maximum Cannery Prices for Salmon. (a) The prices set forth below are maximum prices per case f. o. b. car at Seattle, Washington, for salmon canned in territory outside the continental United States and f. o. b. car at the shipping point nearest cannery for salmon canned within the United States. For salmon canned in Alaska and sold for consumption in Alaska the maximum price shall be 50c. less per case of 48 one pound cans than the prices set forth below. The maximum prices are gross prices and the seller shall deduct therefrom his customary allowances, discounts, and differentials to purchasers of different classes.

Variety	Style of container	Price per case
Chinook	1/2-lb. flats	\$12.00
Red	1-lb. talls	15.00
Red	1-lb. flats	15.50
Red	1/2-lb. flats	9.00
Coho	1-lb. talls	11.60
Coho	1-lb. flats	12.30
Coho	1/2-lb. flats	7.75
Pink	1-lb. talls	8.00

Plaintiff's Exhibit N—(Continued)

Variety	Style of container	Price per case
Pink	1-lb. flats	\$8.00
Pink	1½-lb. flats	5.20
Chum	1-lb. talls	7.60
Chum	1½-lb. flats	5.00
Alaska Sockeye	1-lb. talls	15.00
Alaska Sockeye	1-lb. flats	16.00
Alaska Sockeye	1½-lb. flats	11.00
Puget Sound Sockeye..	1-lb. talls	18.00
Puget Sound Sockeye..	1-lb. flats	19.00
Puget Sound Sockeye..	1½-lb. flats	11.00

(b) For varieties, container sizes, or types and styles of pack of salmon not listed in paragraph (a) the price shall be a price determined by the Office of Price Administration to be in line with the prices listed in paragraph (a). Such determination shall be made upon written request, addressed to the Office of Price Administration, Washington, D. C., and accompanied by sworn statements showing costs and usual differentials.

Issued this 9th day of November 1942.

LEON HENDERSON,
Administrator. [422]

PLAINTIFF'S EXHIBIT O

Office of Price Administration

(Document No. 57433)

Part 1364—Fresh, Cured, and Canned Meat
and Fish Products
[MPR 265, Amdt. 5]

Aug. 28, 1946

Sales by Cannery of Salmon

A statement of the considerations involved in the issuance of this amendment, issued simultaneously herewith, has been filed with the Division of the Federal Register.

Maximum Price Regulation No. 265 is amended as follows:

1. The table of prices in § 1364.562 is amended to read as follows:

Variety and style of container:	Price per case
Alaska King, 1-lb. talls.....	\$17.32
Alaska Chinook:-	
1-lb. flats	21.78
1½-lb. flats	12.38
Alaska Red:	
1-lb. talls	18.56
1-lb. flats	19.18
1½-lb. flats	12.38

	Price per case
Coho:	
1-lb. talls	\$14.36
1-lb. flats	15.22
1½-lb. flats	9.90
¼-lb. flats	6.44
Pink:	
1-lb. talls	9.90
1-lb. flats	9.90
½-lb. flats	6.93
¼-lb. flats	4.83
Chum:	
1-lb. talls	9.40
½-lb. flats	6.68
Copper River Sockeye:	
1-lb. talls	18.56
1-lb. flats	19.80
½-lb. flats	13.61
Puget Sound Sockeye:	
1-lb. talls	22.28
1-lb. flats	23.51
½-lb. flats	14.11

Columbia River

Chinook, Fancy:

1-lb. talls	23.51
1-lb. flats	25.49
1-lb. ovals, C. R.....	29.70
½-lb. flats, C. R.....	16.09
½-lb. Ovals, C. R.....	19.80
¼-lb. flats, C. R.....	8.17

	Price per case
Chinook, Choice:	
1-lb. talls	\$19.80
1-lb. flats	21.78
1/2-lb. flats, C. R.....	12.38
1/4-lb. flats, C. R.....	6.44

Chinook, Standard:	
1-lb. talls	16.09
1-lb. flats	17.32
1/2-lb. flats, C. R.....	9.90
1/4-lb. flats, C. R.....	5.94

Chinook, Unclassified:	
1-lb. talls	12.38
1-lb. flats	13.61
1/2-lb. flats, C. R.....	7.92

Silverside:	
1-lb. talls	14.60
1-lb. flats	17.32
1/2-lb. flats, C. R.....	9.90
1/4-lb. flats, C. R.....	6.44

Steelheads:	
1-lb. talls	19.80
1-lb. flats	21.78
1/2-lb. flats, C. R.....	12.38
1/2-lb. ovals, C. R.....	14.85
1/4-lb. flats, C. R.....	6.44

Bluebacks:	
1/2-lb. flats, C. R.....	14.74

Chums:	Price. per case
1-lb. talls	\$9.40
1-lb. flats	11.14
1½-lb. flats, C. R.	6.19

This amendment shall become effective August 30, 1946.

Issued this 28th day of August 1946.

GEOFFREY BAKER,
Acting Administrator.

Approved: August 27, 1946.

CHARLES F. BRANNAN,
Acting Secretary of Agriculture.

Statement of the Considerations Involved in the
Issuance of Amendment 5 to Maximum Price
Regulation No. 265

The accompanying amendment increases by 12½% canners' prices for all varieties of canned salmon covered by this regulation except Columbia River Bluebacks.

The increased price to the consumer for a 1 pound can of pink salmon will be about 3 to 4 cents and the increase for a 1 pound can of Alaska red salmon about 5 to 6 cents.

This action is being taken in accordance with a notification from the Department of Agriculture that this increase is necessary in order to attain the necessary production of canned salmon.

Issued this 28th day of August 1946.

GEOFFREY BAKER,
Acting Administrator. [423]

PLAINTIFF'S EXHIBIT P

Grimes Packing Company

Ouzinkie, Alaska

Total Fish Packed—Caught by all kinds of Gear

	Reds	Pinks	Chums	Cohoos	Total
Total Catch—Estimated from Pack					
1941	76,546	505,560	39,790	29,050	630,946
1942	77,490	345,664	33,970	23,280	480,404
1943	69,426	482,306	17,611	2,709	572,052
1944	131,600	481,280	27,430	14,247	654,557
1945	131,247	547,975	54,120	3,760	737,102
1946	32,852	667,474	30,510	2,949	733,785

442

Frank Hynes vs.

Grimes Packing Co., et al.

443

	Reds	Pinks	Chums	Cohoos	Total
Total Packs—48/1# Tall Cases					
1941	5,539	22,980	3,979	2,905	35,403
1942	5,166	15,712	3,397	2,328	26,603
1943	4,959	21,923	1,601	301	28,784
1944	9,400	24,064	2,743	1,583	37,790
1945	8,757	23,825	4,920	376	37,878
1946	2,388	33,453	3,544	645	40,030
Totals	36,209	141,957	20,184	8,138	206,488

Percentage of Total Catch from Karluk
(All years estimated except 1946) (Cases)

Estimated	1941 (7%).....	388	1,609	278	203	2,478
	1942 (10%).....	516	1,571	340	233	2,660
	1943 (10%).....	496	2,192	160	30	2,878
	1944 (30%).....	2,820	7,219	823	475	11,337
	1945 (20%).....	1,751	4,765	984	75	7,575
Actual	1946	25% 597	80% 26,762	50% 1,772	20% 129	29,260

FISH AND WILDLIFE SERVICE

TO EARL MAYOR FISH AND WILDLIFE SERVICE KODIAK ALASKA

FROM FRANK W. HYNES FISH AND WILDLIFE SERVICE JUNEAU ALASKA MAY 23 1946

IN ORDER CLARIFY REGULATION 802.83R WHICH PROHIBITS FISHING IN WATERS KODIAK RESERVATION EXCEPT BY NATIVES IN POSSESSION THEREOF AND PERSONS AUTHORIZED BY SAID NATIVES YOU ARE DIRECTED TO ARRANGE FOR THAT CASE ON FIRST DAY SEASON OPENS TO PACKERS HAVE DECLARED INTENTION TO FISH IN RESERVATION CONTRARY TO PROVISIONS OF REGULATIONS THEREFORE WILL WELCOME EARLY COURT DECISION TO DISCUSS MATTER WITH U.S. ATTORNEY AND COMMISSIONER AND ADVISE COURSE OF ACTION YOU PROPOSE TO TAKE

FRANK W. HYNES
REGIONAL DIRECTOR
FISH AND WILDLIFE SERVICE

Deputy Identification D
Deputy Exhibit 4
James Phylloidal
vs. Hynes etc
No. 5505

STANDARD FORM NO. 14
APPROVED BY THE PRESIDENT
MARCH 18, 1926



TELEGRAM

OFFICIAL BUSINESS - GOVERNMENT RATES

FROM DEPARTMENT OF THE INTERIOR
BUREAU FISH AND WILDLIFE SERVICE

CHG. APPROPRIATION _____

U. S. GOVERNMENT PRINTING OFFICE

16-1728

CHICAGO, ILLINOIS, MAY 28, 1946.

RADIO ROUTE

THOMPSON
FISH AND WILDLIFE SERVICE
JUNEAU, ALASKA

SENDING CHANEY COPY YOURS MAY TWENTY FIVE TO SECURE HIS OPINION
ADVISABILITY KARLUK TEST CASE RECOMMENDED BY FOLTA, ALSO WHAT PERSONNEL
THIS SERVICE SHOULD DO TOWARD ENFORCEMENT REGULATION 200.23R.

WARD T. BOWER.

CONFIRMATION COPY

A circular postmark from the Library of Congress, dated JUN 14 1946. The text "LIBRARY OF CONGRESS" is curved along the top inner edge, and "POST OFFICE" is curved along the bottom inner edge. The date "JUN 14 1946" is printed in the center. There are small stars on either side of the date.

1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	32	33	34	35	36	37	38	39	40	41	42	43	44	45	46	47	48	49	50	51	52	53	54	55	56	57	58	59	60	61	62	63	64	65	66	67	68	69	70	71	72	73	74	75	76	77	78	79	80	81	82	83	84	85	86	87	88	89	90	91	92	93	94	95	96	97	98	99	100
<p> 1. GENERAL INFORMATION 2. ADDITIONAL INFORMATION 3. ADDITIONAL INFORMATION 4. ADDITIONAL INFORMATION 5. ADDITIONAL INFORMATION 6. ADDITIONAL INFORMATION 7. ADDITIONAL INFORMATION 8. ADDITIONAL INFORMATION 9. ADDITIONAL INFORMATION 10. ADDITIONAL INFORMATION 11. ADDITIONAL INFORMATION 12. ADDITIONAL INFORMATION 13. ADDITIONAL INFORMATION 14. ADDITIONAL INFORMATION 15. ADDITIONAL INFORMATION 16. ADDITIONAL INFORMATION 17. ADDITIONAL INFORMATION 18. ADDITIONAL INFORMATION 19. ADDITIONAL INFORMATION 20. ADDITIONAL INFORMATION 21. ADDITIONAL INFORMATION 22. ADDITIONAL INFORMATION 23. ADDITIONAL INFORMATION 24. ADDITIONAL INFORMATION 25. ADDITIONAL INFORMATION 26. ADDITIONAL INFORMATION 27. ADDITIONAL INFORMATION 28. ADDITIONAL INFORMATION 29. ADDITIONAL INFORMATION 30. ADDITIONAL INFORMATION 31. ADDITIONAL INFORMATION 32. ADDITIONAL INFORMATION 33. ADDITIONAL INFORMATION 34. ADDITIONAL INFORMATION 35. ADDITIONAL INFORMATION 36. ADDITIONAL INFORMATION 37. ADDITIONAL INFORMATION 38. ADDITIONAL INFORMATION 39. ADDITIONAL INFORMATION 40. ADDITIONAL INFORMATION 41. ADDITIONAL INFORMATION 42. ADDITIONAL INFORMATION 43. ADDITIONAL INFORMATION 44. ADDITIONAL INFORMATION 45. ADDITIONAL INFORMATION 46. ADDITIONAL INFORMATION 47. ADDITIONAL INFORMATION 48. ADDITIONAL INFORMATION 49. ADDITIONAL INFORMATION 50. ADDITIONAL INFORMATION 51. ADDITIONAL INFORMATION 52. ADDITIONAL INFORMATION 53. ADDITIONAL INFORMATION 54. ADDITIONAL INFORMATION 55. ADDITIONAL INFORMATION 56. ADDITIONAL INFORMATION 57. ADDITIONAL INFORMATION 58. ADDITIONAL INFORMATION 59. ADDITIONAL INFORMATION 60. ADDITIONAL INFORMATION 61. ADDITIONAL INFORMATION 62. ADDITIONAL INFORMATION 63. ADDITIONAL INFORMATION 64. ADDITIONAL INFORMATION 65. ADDITIONAL INFORMATION 66. ADDITIONAL INFORMATION 67. ADDITIONAL INFORMATION 68. ADDITIONAL INFORMATION 69. ADDITIONAL INFORMATION 70. ADDITIONAL INFORMATION 71. ADDITIONAL INFORMATION 72. ADDITIONAL INFORMATION 73. ADDITIONAL INFORMATION 74. ADDITIONAL INFORMATION 75. ADDITIONAL INFORMATION 76. ADDITIONAL INFORMATION 77. ADDITIONAL INFORMATION 78. ADDITIONAL INFORMATION 79. ADDITIONAL INFORMATION 80. ADDITIONAL INFORMATION 81. ADDITIONAL INFORMATION 82. ADDITIONAL INFORMATION 83. ADDITIONAL INFORMATION 84. ADDITIONAL INFORMATION 85. ADDITIONAL INFORMATION 86. ADDITIONAL INFORMATION 87. ADDITIONAL INFORMATION 88. ADDITIONAL INFORMATION 89. ADDITIONAL INFORMATION 90. ADDITIONAL INFORMATION 91. ADDITIONAL INFORMATION 92. ADDITIONAL INFORMATION 93. ADDITIONAL INFORMATION 94. ADDITIONAL INFORMATION 95. ADDITIONAL INFORMATION 96. ADDITIONAL INFORMATION 97. ADDITIONAL INFORMATION 98. ADDITIONAL INFORMATION 99. ADDITIONAL INFORMATION 100. ADDITIONAL INFORMATION </p>																																																																																																			

CBMC

BY LETTER JUNE 5 TO ARNOLD AND OTHERS RE KARLUK TEST CASE
ACCEPTED BY INDUSTRY PERIOD THEREFORE PREPARE AND SEND OUT OVER
OVER YOUR SIGNATURE LETTERS TO ALL INDIVIDUALS AND COMPANIES
MOST LIKELY FISHING VICINITY KARLUK READING QUOTE YOUR ATTENTION
BE DIRECTED TO THE PROVISIONS OF THE REGULATIONS FOR THE
PROTECTION OF THE COMMERCIAL FISHERIES OF ALASKA AS AMENDED
MARCH 23 1946 11 FR 3103 PERIOD A COPY OF THESE REGULATIONS IS
ENCLOSED AND YOUR ATTENTION PARTICULARLY IS DIRECTED TO SUBSECTION
/ WHICH HAS BEEN ADDED TO SECTION 204.23 PERIOD THIS NEW SUBSECTION
PROHIBITS ALL SALMON FISHING EXCEPT BY NATIVES IN POSSESSION OF
THE RESERVATION AND BY OTHER PERSONS UNDER AUTHORITY GRANTED
BY SAID NATIVES COMMA WITHIN 3000 FEET OF THE SHORES OF KARLUK
RESERVATION PARAGRAPH FULL COMPLIANCE WITH THE PROVISIONS OF THE
NEW SUBSECTION REFERRED TO COMMA WELL AS WITH ALL OTHER

PROTECTION OF THE COMMERCIAL FISHERIES OF ALASKA AS AMENDED
MARCH 23 1946 11 FR 3103 PERIOD A COPY OF THESE REGULATIONS IS
ENCLOSED AND YOUR ATTENTION PARTICULARLY IS DIRECTED TO SUBSECTION
WHICH HAS BEEN ADDED TO SECTION 208.23 PERIOD THIS NEW SUBSECTION
PROHIBITS ALL SALMON FISHING EXCEPT BY NATIVES IN POSSESSION OF
THE RESERVATION AND BY OTHER PERSONS UNDER AUTHORITY GRANTED
BY SAID NATIVES COMMA WITHIN 3000 FEET OF THE SHORES OF KARLUK
RESERVATION PARAGRAPH FULL COMPLIANCE WITH THE PROVISIONS OF THE
NEW SUBSECTION REFERRED TO COMMA AS WELL AS WITH ALL OTHER
PROVISIONS OF THE REGULATIONS AND OF THE LAWS AFFECTING THE
COMMERCIAL FISHERIES OF ALASKA COMMA IS REQUIRED OF YOU PERIOD
THE NEW REGULATION AS WELL AS THE OTHERS WILL BE ENFORCED IN
ACCORDANCE WITH THE PROVISIONS OF LAWS AUTHORIZING THE REGULATION
OF THE COMMERCIAL FISHERIES OF ALASKA COMMA WHICH MAY INCLUDE
THE SEIZURE OF BOATS COMMA GEAR COMMA AND APPLIANCES USED OR
EMPLOYED IN VIOLATION OF THE REGULATIONS AND OF FISH TAKEN
THEREIN OR THEREWITH UNQUOTE AIRMAIL LIST AND ADDRESSES TO WHOM
LETTERS SENT /WARNER W GARDNER/

1421437

Page 1
James H. Best
Hynes etc
5505

5506

0 23 1946 11 3103 205.23 7900

FISH & WILDLIFE SVC

FROM HYNES FISH AND WILDLIFE SERVICE JUNEAU ALASKA JUNE 4 1946

TO MARK MEYER FISH AND WILDLIFE SERVICE KODIAK ALASKA

BOWER HAS DIRECTED THAT NO ACTION BE TAKEN TO ARRANGE FRIENDLY SUIT
INVOLVING ENFORCEMENT REGULATION 208.23 & THEREFORE DISREGARD INSTRUCTIONS
MY WIRE MAY TWENTY FIFTH STOP BOWER ADVISES FURTHER INSTRUCTIONS ENTIRE
KARLUK MATTER WILL BE ISSUED STOP YOU WILL BE NOTIFIED IMMEDIATELY UPON
RECEIPT SUCH INSTRUCTIONS

Defot Identification F

Exhibi
Gunnar Phib et al
vs.
Hynes etc
No 5505

FRANK W HYNES
REGIONAL DIRECTOR

PVH:BA

DEPARTMENT OF THE INTERIOR
RECEIVED
JUN 12 1946
★
GRAM
ALASKA
WILDLIFE SERVICE

BUREAU FISH AND WILDLIFE SERVICE

CHG. APPROPRIATION

10-1753

CHICAGO, ILLINOIS, JUNE 3, 1946.

FISH AND WILDLIFE SERVICE
JUNEAU, ALASKA

CHANEY SAYS HOPES TEST CASE RECOMMENDED BY POLTA FOR JUNE ONE DID NOT
OCCUR. STOP HE SAID EMPLOYEES THIS SERVICE SHOULD AWAIT FURTHER INSTRUCTIONS
ENTIRE KARLUE MATTER.

WARD T. BOWEN.

MAIL & PREVIOUS

DEFENDANT'S EXHIBIT H
(Identification)

[Letterhead U. S. Department of the Interior]
[Wildlife Mgt. JMC]

June 5, 1946.

Dear Mr. Arnold:

This letter is designed to confirm the arrangement made, in the course of the various conversations between certain representatives of the industry and of the Department of the Interior between May 13 and May 21, with respect to the Karluk reservation on Kodiak Island.

1. The industry intends to test the validity of the Departmental action in including the off-shore waters to a distance of 3,000 feet from shore and the Department is willing to cooperate in obtaining such a test in the courts. The course of the litigation will take any of the following three forms:

2. The industry may bring suit to enjoin enforcement, either in Washington or in Alaska. Upon notification of such a desire the Department will issue formal notice of an intention to enforce the reservation under Sec. 208.23(r) of the Alaska Commercial Fishing Regulations for 1946. The notice will be signed, according to the locale of the proposed suit, by the Secretary or the Regional Director for Alaska of the Fish and Wildlife Service. The Government, subject to the concurrence of the Department of Justice, will not interpose procedural objections which would foreclose a decision on

the merits in such a suit nor will it challenge the industry's standing to sue; it will, however, be at liberty to make any use it chooses of related arguments on the merits, such for example as the discretion of the Secretary and the absence of vested rights in the public domain.

If such a suit be brought, the industry agrees to devote its best efforts to avoid fishing in the path of native beach-seining operations within the outer limits of the reservation during the course of the litigation. The Department, on the other hand, prior to a decision in its favor will not, during the course of this litigation, enforce the regulation against such fishing in Karluk waters as does not interfere with beach-seining. If any preliminary or interlocutory injunction be issued, the parties will endeavor to see that its terms follow this understanding.

3. Whether or not an injunction suit be brought by the industry, the Department will enforce the regulations against any fishing in the path of the beach-seining operations, and will institute proceedings (in Alaska or on the West Coast as may seem appropriate) against any person or boat and gear that so interfere with beach seining.

4. If by September 1, no litigation has been commenced under either of the above two paragraphs, the Department (on its own motion or on request of the industry) will consider the desirability of enforcing the regulation as against persons who fish in the reservation waters but do not actively interfere with beach-seining. In such event

arrangements will be made with the industry for a test proceeding, to be prosecuted on the West Coast. The industry agrees, in the event of such proceeding by the United States, to refrain from any procedural contentions which would, if successful, prevent a decision upon the merits.

5. For purposes of this agreement, the litigation will be considered terminated upon final decision, either after argument or by denial of a petition for a writ of certiorari, by the Supreme Court of the United States.

Whatever form the litigation may take, both parties agree to use their best efforts to stipulate the facts to the fullest extent possible.

This letter is not a binding or carefully drawn contract between the parties, but is merely an informal statement of the general intentions of the Department and of the industry. If you accept this understanding, please sign the enclosed carbon copy and return it to me for our files.

Sincerely yours,

/s/ WARNER W. GARDNER

Solicitor.

The above Statement of Intentions is agreed to:

.....
Mr. W. C. Arnold,
Alaska Salmon Industry, Inc.,
Dexter Horton Building,
Seattle, Washington.

2 *Frank Hynes vs.*

Copies to:

Commissioner Brophy, Indian Office

Mr. Chaney, Fish and Wildlife Service

Don C. Foster, Juneau, Alaska

Theodore H. Haas, Juneau, Alaska

Louis C. Mueller, Juneau, Alaska

Frank W. Hynes, Juneau, Alaska

Thomas H. Austern, Washington, D. C. [435]

DEFENDANT'S EXHIBIT J

(Identification)

Via Airmail

June 14, 1946

Mr. Seton Thompson
Fish and Wildlife Service
Cordova, Alaska

Dear Seton:

This morning we received copy of Warner W. Gardner's letter of June 5th to Mr. Arnold in regard to the Hydaburg, Klowack, and Kake Native communities' aboriginal claims and the matter of trespass on the Karluk reservation. Am also enclosing copies of Mr. Bower's airmail memorandum to you dated June 11, 1946, and his memorandum to Donald J. Cheney of June 6th.

While I am sure you have seen all of this correspondence before, it might be a good idea for you to have an extra copy along in case of emergency.

I had a letter from Dan Bates yesterday which indicated that while he was by no means anxious to take on the Cook Inlet assignment, he would do so in order to help us out of a tight spot. No doubt that you have already discussed the matter with him and told him we would like to have him in Anchorage as soon after the 15th of this month as possible since Burns is leaving on that date.

I talked with Earl Bright on the radio-telephone this morning and he informed me that the Brant would be delayed a couple of days beyond the 18th due to the bad weather conditions now prevailing

there in Seattle which prevented completion of painting and other outside work until that time. He and Bert Johnson are coming North via Pan American on the 19th and expect to fly to Anchorage on the 22nd. Earl said he had arranged to transport Agent Roy Lindsley's wife, two children and household furnishings from Seattle direct to Craig on the Brant.

Howard Baltzo returned to Juneau last night from his Icy Strait crab investigation and reported that all operations had ceased out there, including that of the Woods Canning Company. Mr. Baltzo said that he had been unable to collect very much worthwhile information in regard to the numbers of soft-shelled crab and moulting crabs taken in the period since May 15th. Some of the fishermen told him that in the Dundas Bay Region, especially, moulters could be found at almost any season of the year.

Since beginning this letter a wire came in from Warner W. Gardner which I quote:

"From Interior Department Washington D C
To Government Interior Frank W. Hynes Regional Director Fish and [437] Wildlife Service
Juneau Alaska

"My letter June five to Arnold and others Re Karluk test case accepted by industry period
Therefore prepare and send out over your own signature letters to all individuals and companies most likely fishing vicinity Karluk reading quote Your attention is directed to the provisions of the regulations for the protection of.

the commercial fisheries of Alaska as amended March 23, 1946, 11 FR 3103 period A copy of these regulations is enclosed and your attention particularly is directed to subsection (R) which has been added to section 208.23 period This new subsection prohibits all salmon fishing except by natives in possession of the reservation and by other persons under authority granted by said natives comma within 3000 feet of the shores of Karluk Reservation paragraph For your compliance with the provisions of the new subsection referred to comma as well as with all other provisions of the regulations effecting the commercial fisheries of Alaska comma is required of you period The new regulation as well as the others will be enforced in accordance with the provisions of laws authorizing the regulation of the commercial fisheries of Alaska comma which may include the seizure of boats comma gear comma and appliances used or employed in violation of the regulations and of fish taken therein or thereby unquote Airmail list and addresses to whom letters sent."

We are now in process of preparing these letters to be sent out to all of the companies engaged in commercial fishing near Kodiak area, to Mark Meyer and to leaders of the fishermen's organizations there.

Also during the course of dictating this letter, I had a call from Mr. Dan Foster, Mr. Mueller and

Mr. Brunskill. You will recall that Messers Mueller and Brunskill are going to be at Kodiak as Acting Deputy Fishery Management Agents with power to enforce the fishing regulations there. Mr. Mueller, who was at Kodiak last summer and spent a good deal of his time around Karluk, wanted my opinion as to whether it would be a good idea to contact W. C. Arnold and request him to have industry members in that region instruct their seine boat skippers to interfere as little as possible with the fishing of the Karluk beach seine pending final settlement of the issue of Native rights on that reservation. I told him that while no doubt Mr. Arnold himself would be more than willing to go along with him in the matter, and probably most of the industry members would also, it would be hard to say how much compliance could be had from the fishermen who are extremely independent and not in very great sympathy with the idea of the reservation.

All three of these gentlemen appeared to be very sure that Native rights would be upheld in the Supreme Court if the cases go that far.

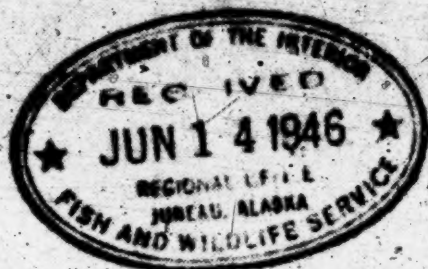
Will keep you advised of further developments.

Attached wire was received after this was written so attached copy to Seton's letter and penciled footnote explaining it to him.

FRANK W. HYNES,
Regional Director

FWH:jeh [438]

SIGNAL CORPS U. S. ARMY
SIGNAL CORPS U. S. ARMY
SIGNAL CORPS U. S. ARMY



<input checked="" type="checkbox"/>	REG. DIRECTOR
<input checked="" type="checkbox"/>	ADM. OFFICER
<input checked="" type="checkbox"/>	ADMIN. ASST.
<input checked="" type="checkbox"/>	ST. HERIES
<input checked="" type="checkbox"/>	WILDLIFE MGT
<input checked="" type="checkbox"/>	PERSONNEL
<input checked="" type="checkbox"/>	PROCUREMENT
<input checked="" type="checkbox"/>	PROPERTY
<input checked="" type="checkbox"/>	ACCOUNTS
<input checked="" type="checkbox"/>	PERMITS
<input checked="" type="checkbox"/>	TIME WORK
<input checked="" type="checkbox"/>	PAYROLL
<input checked="" type="checkbox"/>	MAIL & FILES
<input checked="" type="checkbox"/>	PREVIOUS

KA15

RECEIVED UKS NRA17 51 PAID GOVT RUSH 2 EXTRA

IN WASHINGTON DC JUNE 14 1946 553PM

FRANK T. HYNES 92

REGIONAL DIRECTOR FISH AND WILDLIFE SERVICE JUNEAU ALASKA
OF ADVICE OF DEPARTMENT OF JUSTICE BASED ON OBJECTIONS TO
AGREEMENT INCORPORATED IN MY LETTER TO ARNOLD DATED JUNE 5
CONTRA PLEASE DISREGARD MY TELEGRAM OF TODAY SUGGESTING THAT
YOU SEND OUT LETTERS WITH RESPECT TO ENFORCEMENT OF KARLUK
FISHING REGULATIONS PERIOD ALTERNATIVE MODE OF LITIGATION BEING
CONSIDERED PERILED

WARNER W. GARDNER SOLICITOR DEPTMENT OF THE INT

2349Z

Definite Identification *K*

Exhibit
Quinn's Photo Lab

Hynes etc

5505

DEFENDANT'S EXHIBIT 1

(Identification)

United States Department of the Interior
Washington

Code of Federal Regulations Title 50—Wildlife

Chapter I—Fish and Wildlife Service,

Department of the Interior

Subchapter Q—Alaska Commercial Fisheries

Part 208—Kodiak Area Fisheries

Section 208.18 is hereby amended by substituting a comma for the period at the end of the section and adding the following language:

Provided, That such purse seines shall not be used within five hundred (500) yards of the beach stretching one thousand (1000) yards on the Spit side and five hundred (500) yards on the Improvement side from the mouth of the Karluk River.

Section 208.23 (r) is amended by adding the following sentence:

Such authority shall be granted only by or pursuant to ordinance of the Native Village of Karluk, approved by the Secretary of the Interior or his duly authorized representative.

/s/ J. A. KRUG

Secretary of the Interior.

August 27, 1946.

Certified to be a true copy of the original:

/s/ FLOYD E. DOTSON

Chief Clerk [440]

DEFENDANT'S EXHIBIT N
(Identification)

Minutes of Meeting

May 23, 1944.

The Native Village of Karluk held an election regarding the acceptance of the proposed Indian Reservation for this village. The adoption of said Reservation passed by a vote of 46 for and 0 against. 11 of the eligible voters were absent. Election board made up of Ewan Naumoff, Larry Ellanak and Jacob Laktonen.

The following were elected for the term of one year from this date.

President—Larry Ellanak.

Vice President—Ewan Moses Naumoff.

Sectry and Treas.—Jacob Laktonen.

Council Member—Alex Brown Sr.

— “ “ —Nick Malutin Sr.

— “ “ —Nicanor Melcolie.

— “ “ —Carpa Ambrosia.

A meeting was called by the president and the same evening with Mr. Peters Mr. Watrous of Juneau and Mr. Leraas present. Following discussion and action:

1. The problems of setting aside an area for beach seining were discussed. It was agreed that 1000 yd. from the mouth of the river up the spit and from the mouth of the river to Julia Fort point approximately 500 yd. on the Improvement side, placing markers or buoys.

500 yd. out from mean low water mark be the restricted area for Karluk beach seining only. Purse seining could be done outside this restricted area this year or until further action by the council.

2. It was further agreed that Village purse seiners could fish this restricted area this fall as soon as the beach seining operations ceased.

3. Request was made by Secty-Treas. Jacob Lectonen and approved by the council that Nick Malutin Jr. be called upon to act as an assistant to the secretary and treasurer.

No further business. Meeting adjourned.

/s/ JACOB LAKTONEN,
Secretary and Treasure.

COMMERCIAL

ALASKA PACKERS ASSOCIATION

RADIO DEPARTMENT SAN FRANCISCO, CALIF.

SEND THE FOLLOWING MESSAGE SUBJECT TO THE TERMS ON THE BACK HEREOF WHICH ARE HEREBY AGREED TO.



SENT

(STATION OR STEAMSHIP)

Filed at _____ Date _____ Time _____

Prefix _____ Station sent to _____ By Opr. _____ Check _____

To Please send the attached message to the following:

- | | |
|--------------------------------------------------------|----------------------------------------------------|
| 1. Parks Canning Co. Dyak Bay, Alaska | 12. United Fishermen of Alaska Kodiak, Alaska |
| 2. Alaska Packers Association Larson Bay, Alaska | 13. Washington Fish & Oyster Port Williams, Alaska |
| 3. Uganik Fisheries Co. Uganik, Alaska | 14. Stryan's Inc. Alitak, Alaska |
| 4. Grimes Packing Co. Ozinkie, Alaska | 15. J. Sandvik Co. Uganik Bay, Alaska |
| 5. Alaska Red Salmon Packers, Inc. Corral, Alaska | San Juan Fishing & Pack |
| 6. San Juan Fishing & Packing Co. Uganik Bay, Alaska | |
| 7. Pacific American Fisheries, Inc. Alitak, Alaska | |
| 8. F. McConaghy Company Kodiak, Alaska | |
| 9. Kodiak Fisheries Co. Port Bailey, Alaska | |
| 10. Kodiak Fisheries Co. Bearwater, Alaska | |
| 11. Far North Packing & Shipping Co. Koser Bay, Alaska | |

By _____
 Date _____
 Signature _____

OUR CHARGE	
OTHER LINES	

Sender agrees that neither the Company receiving this message nor any other party concerned in its forwarding shall be liable, beyond the amount of the tariff paid, for any loss, injury or damage from non-delivery, non-transmission or neglect in regard to this message or delay, error or omission in transmission or delivery arising from any cause whatsoever.

I authorize deduction of charges for above message from my account.

Signature of Sender _____

Vessel _____

S/A No. _____

COMMERCIAL

ALASKA PACKERS ASSOCIATION

RADIO DEPARTMENT - SAN FRANCISCO, CALIF.

SEND THE FOLLOWING MESSAGE SUBJECT TO THE TERMS ON
THE BACK HEREOF WHICH ARE HEREBY AGREED TO.



SENT

(STATION OR STEAMSHIP)

Filed at _____ Date _____ Time _____

Prefix _____ Station sent to _____ By Opr. _____ Check _____

To (KAK) Karluk, Alaska May 24, 1944

PLEASE NOTIFY YOUR FISHERMEN THE FOLLOWING STOP BY ORDER OF THE NATIVE VILLAGE OF
KARLUK FISHING OPERATIONS WILL CONTINUE THIS SEASON AS IN PREVIOUS SEASONS ON THE
RECENTLY ESTABLISHED KARLUK RESERVATION EXCEPT FOR A BEACH SKINNING AREA ADJACENT TO
KARLUK RIVER WHICH IS SET ASIDE FOR THE EXCLUSIVE USE OF KARLUK NATIVE BEACH SKINNERS
BOUNDARIES OF WHICH WILL BE CLEARLY DESIGNATED BY PROPER MARKERS AND BUOY STOP
YOUR COOPERATION APPRECIATED

LOUIS C PETERS - ALASKA INDIAN SERVICE

Official Business

Field Agent
Alaska Indian Service
Dept. of Interior

OUR CHARGE	
OTHER CHARGE	

Sender agrees that neither the Company receiving this message nor any other party concerned in its forwarding shall be liable, beyond the amount of the tariff paid, for any loss, injury or damage from non-delivery, non-transmission or neglect in regard to this message or delay, error or omission in transmission or delivery arising from any cause whatsoever.

I authorize deduction of charges for above message from my account.

Signature of Sender _____ Vessel _____

S/A No. _____

Permit No. _____
In Triplicate

(X) Resident
() Non resident

COMMERCIAL FISHING PERMIT

Karluk Indian Reservation, Karluk, Alaska, June 30 1946

Pursuant to an Ordinance passed by the Council of the Native Village of Karluk, Alaska, dated May 31 1946, permission is hereby given by the Native Village of Karluk to Ray Hansen of Karluk to enter the waters and land of the Karluk Reservation for the purpose of engaging in commercial fishing for salmon during the period:

June 1 1946 to September 1 1946.

This permit is issued subject to the conditions printed on the back hereof.

P-1
Exhibit

Ray Hansen
vs.
Hansen
Defendant

No. 1

Ray Hansen
Issuing Officer

Ray Hansen
Title

Approved:

W. C. Bingham
Approving Officer

Auto. Teacher A.N.S.
Title

I accept:

Ray Hansen
Permittee

Boat No. or Name: Caroline

Fishing for: Salmon Ugavik Bay, Alaska
(Cannery) Name Address

Printers Note:

This Exhibit consists of 16 "Commercial Fishing Permits", similar to the above but each issued to a different "Permittee".

CONDITIONS

This permit is valid only if approved by the General Superintendent of the Indian Service in Alaska or his duly authorized representative, and is revocable in the discretion of the issuing officer. It is not transferable and must be carried on the person of the permittee when engaged in fishing authorized hereunder, and must be exhibited to any person requesting to see it. This permit is issued and accepted by the permittee on the express condition that the permittee will comply with all of the provisions of law and regulations governing fishing on the Karluk Indian Reservation, Alaska. The permittee is warned not to interfere with the fishing activities of the Indians of the Karluk Indian Reservation nor use, disturb, or destroy any property belonging to said Indians.

Permit No. 043
In Triplicate

☒ Resident
☐ Non resident

COMMERCIAL FISHING PERMIT

Karluk Indian Reservation, Karluk, Alaska, June 1 1946

Pursuant to an Ordinance passed by the Council of the Native Village of Karluk, Alaska, dated May 3/1946, permission is hereby given by the Native Village of Karluk to Charles H. Harmon

Charles H. Harmon to enter the waters and land of the Karluk Reservation for the purpose of engaging in commercial fishing for Salmon P.C.C. during the period: June 1946 to September 1946.

This permit is issued subject to the conditions printed on the back hereof.

Right Identification P-2

Exhibit
Quinn P. H. H. H.

vs.
Hypocrite

No. 5505

James M. Harmon
Issuing Officer

James M. Harmon
Title

Approved:
HCB Harmon
Approving Officer

Aut. Teacher A. H. H.
Title

I accept:

Charles H. Harmon
Permittee

Boat No. or Name: Betty Lou

Fishing for: Salmon Cannery V. J. R. R.
(Cannery) Name Address

Printer's Note:

This Exhibit consists of 7 "Commercial Fishing Permits", similar to the foregoing but each issued to a different "Permittee".

CONDITIONS

This permit is valid only if approved by the General Superintendent of the Indian Service in Alaska or his duly authorized representative, and is revocable in the discretion of the issuing officer. It is not transferable and must be carried on the person of the permittee when engaged in fishing authorized hereunder, and must be exhibited to any person requesting to see it. This permit is issued and accepted by the permittee on the express condition that the permittee will comply with all of the provisions of law and regulations governing fishing on the Karluk Indian Reservation, Alaska. The permittee is warned not to interfere with the fishing activities of the Indians of the Karluk Indian Reservation nor use, disturb, or destroy any property belonging to said Indians.

Permit No. 084
In Triplicate

(X) Resident
Non resident

COMMERCIAL FISHING PERMIT

Karluk Indian Reservation, Karluk, Alaska, July 13 1946

Pursuant to an Ordinance passed by the Council of the Native Village of Karluk, Alaska, dated May 31 1946, permission is hereby given by the Native Village of Karluk to Robert A. Thorne

Kodiak Alaska to enter the waters and land of the Karluk Reservation for the purpose of engaging in commercial fishing

for Salmon F. M. Co. during the period:

June 1946 to September 1946.

This permit is issued subject to the conditions printed on the back hereof.

Deft Identification B-3
Fishes
James H. G. Stal
vs.
Hypocrite
No. 5505

Ernest M. Naumoff
Issuing Officer

President Karluk
Title

Approved:

H. C. Brigham
Approving Officer

Asst. Teacher A. H. S.
Title

I accept:

Robert A. Thorne
Permittee

Boat No. or Name: Star Fish

Fishing for: Frank M. G. Comedy Kodiak Alaska
(Name) (Address)

Printer's Note:

This Exhibit consists of 14 "Commercial Fishing Permits", similar to the above but each issued to a different "Permittee".

CONDITIONS

This permit is valid only if approved by the General Superintendent of the Indian Service in Alaska or his duly authorized representative, and is revocable in the discretion of the issuing officer. It is not transferable and must be carried on the person of the permittee when engaged in fishing authorized hereunder, and must be exhibited to any person requesting to see it. This permit is issued and accepted by the permittee on the express condition that the permittee will comply with all of the provisions of law and regulations governing fishing on the Kariak Indian Reservation, Alaska. The permittee is warned not to interfere with the fishing activities of the Indians of the Kariak Indian Reservation nor use, disturb, or destroy any property belonging to said Indians.

Permit No. 029
In Triplicate

(X) Resident
Non resident

COMMERCIAL FISHING PERMIT

Karluk Indian Reservation, Karluk, Alaska, June 21 1946

Pursuant to an Ordinance passed by the Council of the Native Village of Karluk, Alaska, dated May 31 1946, permission is hereby given by the Native Village of Karluk to Ray Arnold of Unalakleet, Alaska the waters and land of the Karluk Reservation for the purpose of engaging in commercial fishing for salmon, trout, etc. during the period:

June 1946 to September 1946.

This permit is issued subject to the conditions printed on the back hereof.

Identification P-4

Exhibit
James Phyllis
vs.
Hyman

Plaintiff
Defendant

No. 5005

Evan M. Kinniff
Issuing Officer

President Karluk
Title

Approved:

H.C. Bingham
Approving Officer

John Teacher A.N.S.
Title

I accept:

Ray Arnold
Permittee

Boat No. or Name: KFC 7

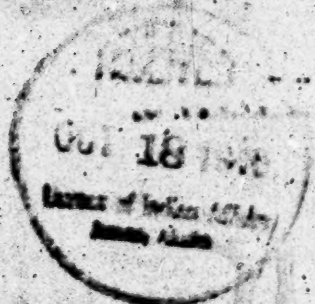
Fishing for: Salmon, Trout, etc.
(Cannery) Name Address

Printer's Note:

This Exhibit consists of 15 "Commercial Fishing Permits", similar to the above but each issued to a different "Permittee".

CONDITIONS

This permit is valid only if approved by the General Superintendent of the Indian Service in Alaska or his duly authorized representative, and is revocable in the discretion of the issuing officer. It is not transferable and must be carried on the person of the permittee when engaged in fishing authorized hereunder, and must be exhibited to any person requesting to see it. This permit is issued and accepted by the permittee on the express condition that the permittee will comply with all of the provisions of law and regulations governing fishing on the Karluk Indian Reservation, Alaska. The permittee is warned not to interfere with the fishing activities of the Indians of the Karluk Indian Reservation nor use, disturb, or destroy any property belonging to said Indians.



Permit No. 062
In Triplicate

() Resident
(X) Non resident

COMMERCIAL FISHING PERMIT

Karluk Indian Reservation, Karluk, Alaska, June 15 1946

Pursuant to an Ordinance passed by the Council of the Native Village of Karluk, Alaska, dated May 31 1946, permission is hereby given by the Native Village of Karluk to Joe M. Surgen of Anaconda Trail to enter the waters and land of the Karluk Reservation for the purpose of engaging in commercial fishing for salmon and trout during the periods:

June 1946 to September 1946.

This permit is issued subject to the conditions printed on the back hereof.

Regd. Identification P-5

Exhibit
James P. G. et al
Plaintiff
vs.
Hypnotic
Defendant

No. 5505

Quinn M. Kaimoff
Issuing Officer

President Karluk
Title

Approved:

H. Bingham
Approving Officer

Aut. Teacher A. M. S.
Title

I accept:

Joe M. Surgen
Permittee

Boat No. or Name: Lab

Fishing for:
(Cannery)

Lilly McQuill Lilly McQuill
Name Address

Printer's Note:

This Exhibit consists of 3 "Commercial Fishing Permits", similar to the above but each issued to a different "Permittee".

CONDITIONS

This permit is valid only if approved by the General Superintendent of the Indian Service in Alaska or his duly authorized representative, and is revocable in the discretion of the issuing officer. It is not transferable and must be carried on the person of the permittee when engaged in fishing authorized hereunder, and must be exhibited to any person requesting to see it. This permit is issued and accepted by the permittee on the express condition that the permittee will comply with all of the provisions of law and regulations governing fishing on the Karluk Indian Reservation, Alaska. The permittee is warned not to interfere with the fishing activities of the Indians of the Karluk Indian Reservation nor use, disturb, or destroy any property belonging to said Indians.

RECEIVED
OCT 18 1946
Bureau of Indian Affairs
Alaska

Permit No. 089
In Triplicate

(X) Resident
() Non resident

COMMERCIAL FISHING PERMIT

Karluk Indian Reservation, Karluk, Alaska, July 21 1946

Pursuant to an Ordinance passed by the Council of the Native Village of Karluk, Alaska, dated May 11, 1946, permission is hereby given by the Native Village of Karluk to Peter L. Unger of Kodiak Alaska to enter the waters and land of the Karluk Reservation for the purpose of engaging in commercial fishing for salmon A.P.C. during the period:

June 1946 to September 1946.

This permit is issued subject to the conditions printed on the back hereof.

Deft. 10-10-46 P-6
James H. Babel
W. Hynes etc
5505

Evan M. Hanniff
Issuing Officer

President. Karluk
Title

Approved:

W. Bingham
Approving Officer

Aut. Teacher A.N.S.
Title

I accept:

Peter L. Unger
Permittee

Boat No. or Name: G.P.C. - 20

Fishing for: Grinner Packing Co. Ouzinkie Alaska
(Cannery) Name Address

Printer's Note:

This Exhibit consists of 13 "Commercial Fishing Permits", similar to the above but each issued to a different "Permittee".

CONDITIONS

This permit is valid only if approved by the General Superintendent of the Indian Service in Alaska or his duly authorized representative, and is revocable in the discretion of the issuing officer. It is not transferable and must be carried on the person of the permittee when engaged in fishing authorized hereunder, and must be exhibited to any person requesting to see it. This permit is issued and accepted by the permittee on the express condition that the permittee will comply with all of the provisions of law and regulations governing fishing on the Karluk Indian Reservation, Alaska. The permittee is warned not to interfere with the fishing activities of the Indians of the Karluk Indian Reservation nor use, disturb, or destroy any property belonging to said Indians.

Permit No.
In Triplicate

(X) Resident
() Non resident

COMMERCIAL FISHING PERMIT

Karluk Indian Reservation, Karluk, Alaska, June 1946

Pursuant to an Ordinance passed by the Council of the Native Village of Karluk, Alaska, dated May 31 1946, permission is hereby given by the Native Village of Karluk to William Hansen
Kodiak Alaska enter the waters and land of the Karluk Reservation for the purpose of engaging in commercial fishing for salmon W. F. Co. during the period:
June 1946 to September 1946.

This permit is issued subject to the conditions printed on the back hereof.

Evan M. Hamnoff
Issuing Officer

Abundant Karluk
Title

Approved:

W. C. Bingham
Approving Officer

Act. Teacher A. H. S.
Title

I accept:

Wm Hansen
Permittee

Boat No. or Name: Wafico No 7.

Fishing for: Salmon & ayote
(Cannery)

Name

Address

515

Printer's Note:

This Exhibit consists of 5 "Commercial Fishing Permits", similar to the above but each issued to a different "Permittee".

(b) Section 3637, Compiled Laws of Alaska, 1933: "The verdict of the jury, any order or decision, partially or finally determining the rights of the parties, or any of them, or affecting the pleadings, or granting or refusing a continuance, or granting or refusing a new trial, or admitting or rejecting the evidence, provided objection be made to its admission or rejection at the time of its offer, or made upon ex parte application or in the absence of a party, Are Deemed Excepted to Without the Exception Being Taken or Stated, or Entered in the Journal.

It shall not be necessary for counsel to take exceptions in such cases, but, if they so wish, they may, in making up a bill of exceptions for the same, show that the exception was duly taken."

Done at Fairbanks, Alaska, this 26th day of March, 1947.

HARRY E. PRATT,
District Judge.

[Endorsed]: Filed March 31, 1947. [538]

[Title of District Court and Cause.]

In the Matter of the Rules of the Above-Entitled
Court

RULE OF COURT No. 47

It Is Hereby Ordered that the following be, and the same is, hereby adopted as a rule of this Court, to-wit:

(a) The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the expiration of a term of court. The expiration of a term of court in no way affects the power of this court to do any act or take any proceeding in any civil or criminal action which has been pending before it.

(b) Any and all undisposed of matters of any nature, pending in this court at the termination of any term, shall be continued over to the next term, and the situation respecting the same shall in no wise be affected by the termination of any term or terms.

Done at Fairbanks, Alaska, this 26th day of March, 1947.

HARRY E. PRATT,
District Judge.

[Endorsed]: Filed March 31, 1947. [539]

[Title of District Court and Cause:]

CERTIFICATE OF CLERK OF THE DISTRICT COURT TO TRANSCRIPT OF RECORD

I, John B. Hall, Clerk of the District Court for the Territory of Alaska, Fourth Judicial Division, do hereby certify that the foregoing, consisting of 539 pages, constitutes a full, true, and correct transcript of the record on appeal in Cause No. 5505, entitled *Grimes Packing Co., Kadiak Fisheries Com-*

CONDITIONS

This permit is valid only if approved by the General Superintendent of the Indian Service in Alaska or his duly authorized representative, and is revocable in the discretion of the issuing officer. It is not transferable and must be carried on the person of the permittee when engaged in fishing authorized hereunder, and must be exhibited to any person requesting to see it. This permit is issued and accepted by the permittee on the express condition that the permittee will comply with all of the provisions of law and regulations governing fishing on the Karluk Indian Reservation, Alaska. The permittee is warned not to interfere with the fishing activities of the Indians of the Karluk Indian Reservation nor use, disturb, or destroy any property belonging to said Indians.

Permit No. 052
In Triplicate

☒ Resident
☐ Non resident

COMMERCIAL FISHING PERMIT

Karluk Indian Reservation, Karluk, Alaska, June 23 1946

Pursuant to an Ordinance passed by the Council of the Native Village of Karluk, Alaska, dated May 31 1946, permission is hereby given by the Native Village of Karluk to E. L. Dixon of

Karluk Wash to enter the waters and land of the Karluk Reservation for the purpose of engaging in commercial fishing for salmon P. C. Co. during the period: June 1946 to September 1946.

This permit is issued subject to the conditions printed on the back hereof.

D. J. G. Suburban P-5
Exhibit
Quinn P. G. G. G. Plaintiff
vs. H. G. G. Defendant
No. 5505

E. L. Dixon
Issuing Officer

President Karluk
Title

for salmon P. C. Co. during the period:

June 1946 to September 1946.

This permit is issued subject to the conditions printed on the back hereof.

D. J. G. Suburban P-5
Exhibit
Quinn P. G. G. G. Plaintiff
vs. H. G. G. Defendant
No. 5505

E. L. Dixon
Issuing Officer

President Karluk
Title

Approved:

H. C. Bingham
Approving Officer

Ant. Teacher A. N. S.
Title

I accept:

E. L. Dixon
Permittee

Boat No. or Name: ARSP

Fishing for: Ocean Can. Co. Council
(Cannery) Name Address

Printer's Note:

This Exhibit consists of 8 "Commercial Fishing Permits", similar to the above but each issued to a different "Permittee".

Thereafter, on the 2nd day of November, 1946, the court made and ordered entered its "Findings of Fact and Conclusions of Law."

On the 6th day of November, 1946, the court signed and ordered entered its decree granting a permanent injunction.

Thereafter, on the 19th day of December, 1946, the court entered an order allowing the defendant until the 15th day of May, 1947, to present and file his proposed Bill of Exceptions and allowing the plaintiffs fifteen (15) days from the date of filing said proposed Bill of Exceptions to file objections thereto.

The above and foregoing is all the evidence introduced at the trial of said cause and all proceedings had in the trial thereof.

Wherefore, Frank Hynes, defendant and appellant, tenders and presents the foregoing as its Bill of Exceptions in said cause and prays that the same may be settled, allowed and signed and sealed and made a part of the record in said cause by this court pursuant to the law in such cases.

/s/ DAVID L. BAZELON,

Assistant Attorney General.

/s/ HARRY O. AREND,

United States Attorney,
Fairbanks, Alaska.

/s/ WM. E. BERRETT,

Assistant United States Atty.,
Fairbanks, Alaska.

/s/ ROGER P. MARQUIS,

Attorney, Department of
Justice, Washington, D. C.

[Endorsed]: Filed Feb. 27, 1947. [528]

[Title of District Court and Cause.]

ACKNOWLEDGMENT OF SERVICE

Service by receipt of a certified copy of the proposed Bill of Exceptions in the above-entitled matter is hereby acknowledged.

Dated this 3rd day of March, 1947.

EDWARD F. MEDLEY,

Of Counsel for All Plaintiffs
and Appellees.

[Endorsed]: Filed Mar. 5, 1947. [529]

[Title of District Court and Cause.]

ORDER SETTLING AND ALLOWING BILL OF EXCEPTIONS

Be it remembered that upon this 24th day of March, 1947, the matter of settling the Bill of Exceptions in the above-entitled cause came on regularly for hearing, and the Judge of the above-mentioned Court being duly advised in the premises, it is hereby Ordered, Adjudged and Certified as to said Bill of Exceptions consisting of 325 pages plus exhibits and identifications, as follows, to-wit:

a. That the same has been filed, allowed and certified within the time required by law and the Rules of this Court and extensions of time heretofore duly granted by this Court;

b. That the same contains the complete Transcript of Testimony and evidence before the Court on the trial of said cause; that it sets forth the

exceptions taken and reserved upon the trial and the rulings of the Court made therein; all of the oral and documentary evidence given upon the trial of said cause, and all of the documentary evidence offered and rejected as evidence in said cause which is necessary to clearly present the questions of law involved in the rulings to which exceptions were reserved and errors assigned in the Assignments of Error heretofore filed in this cause (save and except plaintiffs' Exhibits 1, 2, 3, 5-a, 5-b, 5-c and defendant's identifications P-1 through P-8) hereinafter mentioned.

c. That the same is hereby settled, allowed and signed as the true and [530] correct Bill of Exceptions of all matters and things therein contained;

d. That said Bill of Exceptions is hereby made a part of the record of this cause;

e. That this order constitute the Judge's certificate to said Bill of Exceptions and that the same be placed by the Clerk of this Court at the end of said Bill of Exceptions and attached to the same as a part thereof;

f. That Plaintiffs' Exhibits "Q" and "R" and Defendant's Exhibits "1," "2," "3," "5-A," "5-B," "5-C" and Defendant's Identifications "P-1" through "P-8" be, and they are hereby, directed to be forwarded by the Clerk of this Court to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, as a part of the Bill of Exceptions in this cause for the examination and inspection of said Circuit Court

of Appeals, it appearing to this Court that it is proper and advantageous in this appeal that said original exhibits hereinabove last mentioned be placed before said last named Court for its examination and inspection. Said exhibits so enumerated and to be transferred, are hereby made a part of the Bill of Exceptions herein.

Done in Open Court this 24th day of March, 1947,
at Juneau, Alaska.

HARRY E. PRATT,

District Judge.

• Mar. 24, 1947.

Lodged March 21, 1947.

[Endorsed]: Filed Mar. 25, 1947. [531]

[Title of District Court and Cause.]

**MOTION FOR AN ORDER EXTENDING TIME
TO FILE RECORD AND DOCKET CAUSE**

Comes now the defendant Frank Hynes, by his attorneys, Harry O. Arend and Wm. E. Berritt, and moves the Court for an order extending time to file record and docket cause on appeal to the Circuit Court of Appeals, Ninth Circuit, to May 3rd, 1947, and in support of motion says:

That due to the contemplated absence of Judge Harry E. Pratt, trial judge in the above case, from this jurisdiction between Feb. 24 and April 24, 1947, for all of the balance of the forty (40) day period allowed by the rules of Court for the filing of record and docketing of cause in the Circuit

Court of Appeals, Ninth Circuit, said Judge will not be available to settle the Bill of Exceptions hereinafter to be filed and without which the docketing cannot be completed.

That the issues of this cause are so involved and the testimony so voluminous as to make it impracticable to place the Bill of Exceptions before another Judge in the District of Alaska.

That time has been already extended by this Court for the above reasons for the filing of the Bill of Exceptions until May 15, 1947.

Dated at Fairbanks, Alaska, this 18th day of February, 1947.

HARRY O. AREND,

WM. E. BERRETT,

Attorneys for the Defendant.

[Endorsed]: Filed Feb. 18, 1947.-[532]

[Title of District Court and Cause.]

**ORDER EXTENDING TIME TO FILE
RECORD AND DOCKET CAUSE**

On motion of the attorneys for appellant for an order extending the time for appellant to file his record and docket this cause on appeal, it appearing to said Court that by reason of the absence of the trial Judge from the Fourth Judicial Division of Alaska during the latter part of the forty (40) day period during which it would be necessary to have a Bill of Exceptions settled and this cause

docketed and said Court being duly advised in the premises and good cause appearing therefor;

It is hereby Ordered that the time within which the record on appeal in this case shall be deposited and filed with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, and said cause docketed therein be, and it is hereby, enlarged to and including the 3rd day of May, 1947.

Done this 18th day of February, 1947.

/s/ HARRY E. PRATT,

District Judge.

[Endorsed]: Filed Feb. 18, 1947. [533]

[Title of District Court and Cause.]

STIPULATION RE PRINTING OF RECORD

It is hereby stipulated by and between the above named parties, plaintiffs and defendant, through their respective attorneys, that in printing the papers and records to be used on the hearing on appeal in the above-entitled cause for the consideration of the United States Circuit Court of Appeals for the Ninth Circuit the title of the Court and cause in full on all papers shall be omitted except on the first page of said record and that there shall be inserted in place of said title in all papers used as a part of said record the words "Title of Court and Cause." Also that all endorsements on all papers used as part of said record shall be omitted

except the Clerk's filing marks and the admission of service.

Dated at Fairbanks, Alaska, this 17th day of February, 1947.

/s/ HARRY O. AREND,

/s/ WM. E. BERRETT,

Attorneys for Defendant and
Appellant.

MEDLEY & HAUGLAND,
BOGLE, BOGLE & GATES,

/s/ W. C. ARNOLD,

Attorneys for Plaintiffs and
Appellees.

[Endorsed]: Filed Feb. 20, 1947. [534]

[Title of District Court and Cause.]

**PRAECIPE DESIGNATING CONTENTS OF
THE RECORD ON APPEAL**

To the Clerk:

You are requested to take a transcript of record to be filed in the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, pursuant to an appeal allowed in the above-entitled cause and to include in such transcript of record the following and no other papers or exhibits, to-wit:

1. Complaint.
2. Stipulation re Part I of Complaint.
3. Answer.
4. Minutes of proceedings, October 31, 1946.
5. Findings of Fact and Conclusions of Law.

6. Permanent Injunction.
7. Opinion.
8. Petition for Allowance of Appeal.
9. Assignment of Error.
10. Order Allowing Appeal.
11. Citation on Appeal.
12. Acknowledgment of Service of Citation.
13. Motion for and order extending the time to file Bill of Exceptions. [535]
14. Bill of Exceptions.
15. Acknowledgment of Service of Proposed Bill of Exceptions.
16. Order certifying and settling Bill of Exceptions.
17. Motion for and order extending time for filing and docketing action in the appellate court.
18. Stipulation re Printing of Record.
19. This praecipe designating contents of the record on appeal.
20. Acknowledgment of Service of Appellant's Praecipe Designating Contents of Record on Appeal.
21. Rule of Court No. 35.
22. Rule of Court No. 47.

Dated this 1st day of April, 1947.

Respectfully,

/s/ HARRY O. AREND,

United States Attorney,
Fairbanks, Alaska.

/s/ WM. E. BERRETT,

Asst. United States Attorney,
Fairbanks, Alaska.

[Endorsed]: Filed April 2, 1947. [536]

[Title of District Court and Cause.]

ACKNOWLEDGMENT OF SERVICE

Service by receipt of a certified copy of Appellant's Praecipe Designating Contents of the Record on Appeal in the above-entitled matter is hereby acknowledged.

Dated this 4th day of April, 1947.

EDWARD F. MEDLEY,

Of Counsel for all Plaintiffs
and Appellees.

[Endorsed]: Filed Apr. 7, 1947. [537]

[Title of District Court and Cause.]

In the Matter of the Rules of the Above-Entitled
Court

RULE OF COURT No. 35

It Is Hereby Ordered that the following be, and the same is, hereby adopted as a rule of this Court, to-wit:

Rule 42. Exceptions in Civil Cases.

"Whereas the laws of Alaska relative to civil procedure provide:

(a) Section 3636, Compiled Laws of Alaska, 1933: "No exception need be taken or allowed to any decision upon a matter of law when the same is entered in the journal or made wholly upon matters in writing and on file in the Court.

pany, Libby, McNeill & Libby, Frank McConaghy & Co., Inc., Parks Canning Co., Inc., San Juan Fishing & Packing Co., and Uganik Fisheries, Inc., Plaintiffs, versus Frank Hynes, Regional Director, Fish and Wildlife Service, Department of the Interior, Defendant, and was made pursuant to and in accordance with the Praecipe of the Defendant and Appellant, filed in this action, and by virtue of the said Appeal and Citation issued in said cause, and is the return thereof in accordance therewith, and

I do further certify that the Index thereof, consisting of pages "a" and "b," is a correct Index of said Transcript of Record, and that the list of attorneys, as shown on page "c," is a correct list of the attorneys of record.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court this 14th day of April, 1947.

[Seal] /s/ JOHN B. HALL,

Clerk, District Court, Territory of Alaska, 4th Division.

[Endorsed]: No. 11585. United States Circuit Court of Appeals for the Ninth Circuit. Frank Hynes, Regional Director, Fish and Wildlife Service, Department of Interior, Appellant, vs. Grimes Packing Co., Kadiak Fisheries Company, Libby, McNeill and Libby, Frank McConaghy & Co., Inc., Parks Canning Co., Inc., San Juan Fishing & Pack-

ing Co., and Uganik Fisheries, Inc., Appellees.
Transcript of Record. Upon Appeal from the District Court, Territory of Alaska, Fourth Division.

Filed April 16, 1947.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

C. C. A. No. 11585

FRANK HYNES, Regional Director, Fish and
Wildlife Service, Department of Interior,
Appellant,

vs.

GRIMES PACKING CO., KADIAK FISHERIES COMPANY, LIBBY, McNEILL AND LIBBY, FRANK McCONAGHY & CO., INC., PARKS CANNING CO., INC., SAN JUAN FISHING & PACKING CO., and UGANIK FISHERIES, INC.,

Appellees.

STATEMENT OF POINTS AND DESIGNATION OF PARTS OF THE RECORD TO BE PRINTED

Comes now appellant in the above-entitled case and adopts its assignment of errors as its statement

of points to be relied on, and prays that the whole of the record as filed and certified be printed in its entirety.

/s/ DAVID L. BAZELON,

Assistant Attorney General.

HARRY O. AREND,

United States Attorney,
Fairbanks, Alaska.

WILLIAM E. BERRETT,

Asst. United States Attorney.

/s/ ROGER P. MARQUIS,

Attorney, Department of
Justice, Washington, D. C.

[Title of District Court and Cause.]

MOTION TO CONSIDER PLAINTIFFS' EXHIBITS "Q" AND "R" AND DEFENDANT'S EXHIBITS "5a," "5b," and "5c" AS ORIGINAL EXHIBITS NOT TO BE INCLUDED IN THE PRINTED RECORD

Comes now the appellant in the above-entitled case and moves the Court to consider Plaintiffs' Exhibit "Q," a map, Plaintiffs' Exhibit "R," a

chart, and Defendant's Exhibits "5a," "5b," and "5c," photographs, as original exhibits not to be included in the printed Record.

/s/ DAVID L. BAZELON,
Assistant Attorney General.

HARRY O. AREND,
United States Attorney,
Fairbanks, Alaska.

WILLIAM E. BERRETT,
Asst. United States Attorney.

/s/ ROGER P. MARQUIS,
Attorney, Department of
Justice, Washington, D. C.

So Ordered:

/s/ WILLIAM DENMAN,
United States Circuit Judge.

**In the United States Circuit Court of Appeals
for the Ninth Circuit**

No. 11585

**FRANK HYNES, REGIONAL DIRECTOR, FISH AND WILDLIFE
SERVICE, DEPARTMENT OF INTERIOR, APPELLANT**

v.

GRIMES PACKING CO., ET AL., APPELLEES

**UPON APPEAL FROM THE DISTRICT COURT FOR THE TERRITORY
OF ALASKA, FOURTH DIVISION**

**PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE NINTH CIRCUIT**

In the United States Circuit Court of Appeals for the Ninth
Circuit

EXCERPT FROM PROCEEDINGS OF THURSDAY, OCTOBER 16, 1947

Before DENKMAN, HEALY, and BONE, Circuit Judges

ORDER OF SUBMISSION

Ordered appeal herein argued by Mr. Roger P. Marquis, Attorney, Department of Justice, counsel for appellant, and by Messrs. Frank L. Mechem and W. C. Arnold, counsel for appellees, and submitted to the court for consideration and decision.

In the United States Circuit Court of Appeals for the Ninth
Circuit

EXCERPT FROM PROCEEDINGS OF FRIDAY, NOVEMBER 21, 1947

Before DENMAN, HEALY, and BONE, Circuit Judges

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING
OF DECREE

By direction of the Court, ordered that the typewritten opinion this day rendered by this Court in above cause be forthwith filed by the clerk, and that a decree be filed and recorded in the minutes of this Court in accordance with the opinion rendered.

In the United States Circuit Court of Appeals for the Ninth
Circuit

No. 11585—November 21, 1947.

FRANK HYNES, REGIONAL DIRECTOR, FISH AND WILDLIFE
SERVICE, DEPARTMENT OF THE INTERIOR, APPELLANT

v.

GRIMES PACKING CO., KAKIAK FISHERIES COMPANY, LIBBY,
MCNEILL AND LIBBY, FRANK MCCONAGHY & CO., INC., PARKS
CANNING CO., INC., SAN JUAN FISHING & PACKING CO., AND
UGANIK FISHERIES, INC., APPELLEES

UPON APPEAL FROM THE DISTRICT COURT FOR THE TERRITORY OF
ALASKA, FOURTH DIVISION

Before DENMAN, HEALY, and BONE, Circuit Judges.

DENMAN, *Circuit Judge*: Appellant Hynes appeals from a permanent injunction enjoining him "from enforcing or attempting to enforce the restrictive provisions of Section 208.23 (r) of the 1946 Alaska Fisheries General Regulations and from seizing any boats, seines, nets, or other gear and appliance used or employed in fishing by the plaintiffs in the waters in and adjacent to the Karluk Indian Reservation situated on Kodiak Island, Alaska, three thousand feet seaward from the shore at mean low tide or any fish taken therewith, or from arresting any of plaintiffs' fishermen who carry on fishing operations in said waters."

The district court found that appellant, as Regional Director of the Fish and Wildlife Service of the Department of the Interior, had threatened to seize the appellees' fishing boats and catches of salmon and to arrest their fishermen, some six hundred in number, in the manner prohibited by the injunction, purporting to act under the summary procedures of Section 6 of the White Act of June 6, 1924, 48 USCA 226.

The court held against appellant's contention that these ocean waters below low tide¹ had been included in a reserva-

¹ The injunction and present litigation are not concerned with the rights of the Karluk Indians or others in the eastern waters of Shelikof Strait between high and low water.

tion² for the Indians of Karluk village located on Shelikof Strait, giving the Indians a monopoly of fishing there. It further held that an Alaska Fisheries General Regulation 208.23 (r), designed to give fishing rights to the Karluk Indians in such purportedly reserved ocean waters and denying to all others the right to fish there unless licensed by the Indians to participate in their monopoly, violated Section 1 of the White Act, considered, *infra*, providing that if any persons are allowed to fish in Alaskan waters none shall be excluded.

Regulation 208.23 (r) of the Secretary of the Interior purports to create a monopoly of fishing in the Karluk Indians in the above described ocean waters by providing—

SEC. 208.23. Waters closed to salmon fishing. All commercial fishing for salmon is prohibited as follows:

(r) All waters within 3,000 feet of the shores of Karluk Reservation (Public Land Order No. 128, May 22, 1943), beginning at a point on the east shore of Shelikof Strait, on Kodiak Island, latitude 57°32'30" N., thence northeasterly along said shore to a point 57°39'40".

The foregoing prohibition shall not apply to fishing by natives in possession of said reservation, nor to fishing by other persons under authority granted by said natives (49 Stat. 1250). Such authority shall be granted only by or pursuant to ordinance of the Native Village of Karluk, approved by the Secretary of the Interior, or his duly authorized representative.

It is thus apparent that regulation 208.23 (r) does not contemplate that the ocean waters there involved are ordinary waters open to fishing subject to usual regulations for fish preservation, but that the regulation is based upon the assumption

² In Section 1 of Public Land Order No. 128 of May 22, 1943, the Secretary of the Interior designated as a reservation for the Karluk Indians 35,200 acres of land on Kodiak Island bordering on the east shore of Shelikof Strait. Section 2 adds to the land in the reservation the waters referred to in the court's permanent injunction, as follows:

"2. The area described above and the water adjacent thereto extending 3,000 feet from the shore line at mean low tide, are hereby designated as an Indian reservation for the use and benefit of the native inhabitants of the native village of Karluk, Alaska, and vicinity."

that there is a reservation of these waters in which there is a monopoly of fishing in the Karluk Indians. Further that it is a monopoly in which these Indians may sell licenses to others to participate. Indeed, the appellant claims that the appellee fishing companies and all others have no cause to complain because they could buy such licenses from the Indians to participate in their monopoly and that the appellees have obtained such licenses in the past, and hence have been able to seine as many fish as they would if the regulation had not existed. The regulation has no other purpose than to create the Indians' monopoly on the supposition that an Indian reservation in fact has been created and that the Secretary has a right to permit the Indians to fish there and deny the right to all other fishermen not so licensed.

The primary question for our determination is whether the Secretary of the Interior was authorized by Congress to create an Indian reservation in these waters below low tide for, if they are waters not so reserved, monopoly fishing rights therein are prohibited by Section 1 of the White Act. Since we decide that Congress has not given such authorization to the Secretary, we are not concerned with the question whether—even if so reserved—regulation 208.23 (r) violates the White Act in permitting the licensed fishermen other than Indians to fish there and refusing the right to the unlicensed.

Appellant contends that Congress created the power in the Secretary to reserve to the Karluk Indians such below low tide ocean waters by Section 2 of the amendment of 1936 of the Wheeler-Howard Act of 1934, 48 Stat. 984. Section 2 describes what of the several classes of lands of the United States may be so covered in Indian reservations.

SEC. 2. That the Secretary of the Interior is hereby authorized to designate as an Indian reservation [a] any area of *land* which has been reserved for the use and occupancy of Indians or Eskimos by section 8 of the Act of May 17, 1884 (23 Stat. 26, or [b] by section 14 or section 15 of the Act of March 3, 1891 (26 Stat. 1101), or [c] which has been heretofore reserved under any executive order and placed under the jurisdiction of the Department of the Interior or any bureau

thereof, together with [d] *additional public lands* adjacent thereto within the Territory of Alaska, or any other *public lands* which are actually occupied by Indians or Eskimos within said Territory: Provided, That the designation by the Secretary of the Interior of any *such* area of land as a reservation shall be effective only upon its approval by the vote, by secret ballot, of a majority of the Indian or Eskimo residents thereof who vote at a special election duly called by the Secretary of the Interior upon thirty days' notice: * * * [Italics supplied.]

Concerning the phrase "any area of land which *has been* reserved," it is not contended that these Indians had had reserved to them any of the below tide waters of Shelikof Strait by virtue of the Act of May 17, 1884 (48 USCA 356), or of the Act of March 3, 1891 (48 USCA 358), or by any prior reservation placed under the jurisdiction of the Department of the Interior.

Whatever power the Secretary of the Interior had to reserve for them any lands is created by that portion of Section 2 which reads "The Secretary of the Interior is hereby authorized to designate * * * *additional public lands* adjacent thereto, within the Territory of Alaska, or any other *public lands* which are actually occupied by Indians or Eskimos within such Territory." In this respect the 1936 Act differs from the above Acts of 1884 and 1891 which use the general phrase "lands" without the qualifying adjective "public."

I. *Congress in the 1936 amendment to the Wheeler-Howard Act, authorizing the Secretary of the Interior to reserve "public lands" for Alaska Indian tribes, did not empower him to reserve ocean lands below low water mark. It did not intend to create in the Indians communal monopolies in such salmon fishing waters about the long-established packing plants from which would be excluded the thousands of white fishermen employed in producing for the world, but principally the United States, its largest supply of canned fish food.—The evidence shows that a large part of the 30,000 Alaska Indians live in over eighty small groups, most of them at the mouths of streams into which run the salmon seeking to spawn. Prior to the com-*

ing of the canning and packing plants, the Indians smoked the salmon for winter use, that fish being their principal article of diet. By a process of survival these Indian villages are at the rivers having the largest salmon runs.

Over a half century ago American enterprises began to supply the world, principally the United States, with these salmon processed into cans. These enterprises grew until their investment of upwards of seventy million dollars added to the world's food supply in the three years preceding the 1936 statute, under which the Indian fishing monopolies here in question were purported to be created, an annual average of 5,947,518 cases of 48 pounds each—that is 285,480,899 pounds valued at \$30,-918,700. In 1935, 9,205 fishermen in 845 vessels and 3,989 boats and 11,861 processing employees were engaged in this food production:

Congress, in 1924, in the so-called White Act, hereafter considered, had recognized the character of this addition of this food to the world's commerce by placing the fishing regulations under the Secretary of Commerce. It remained there until 1939, three years after the 1936 Act here to be construed when, under the executive reorganization act of that year, it was transferred to the Secretary of the Interior. Such a shift in the administrator does not change the Congressional recognition of the addition to commerce of this food supply.

For sometime before 1924 the Department of Commerce had created a series of monopolies of exclusive fishing in certain of these Alaskan food processors. The Indians through their counsel joined with other processors excluded by the monopolies to obtain relief from Congress, and, in response to their appeals, the Congress in 1924 enacted the White Act. That Act ended the monopoly system by providing that every fishing regulation made by the Secretary of Commerce "shall be of general application within the particular area to which it applies, and that *no exclusive or several right of fishery shall be granted therein, nor shall any citizen of the United States be denied the right to take, prepare, cure or preserve fish or shellfish in any area of the waters of Alaska where fishing is permitted by the Secretary of Commerce.*" [Italics supplied.]

Whether prior to 1924 citizenship had been conferred on the Alaska Indians and Eskimo who came into the United States not by conquest but by acquisition under the Russian treaty, they clearly were recognized as citizens by the Act of June 2, 1924 (43 Stat. 253), four days before the White Act became law. As such citizens they obtained the freedom from a monopoly exclusion from the fishing waters which they sought in their advocacy of the White Act. This was made apparent by the report on that Act of the House Committee (H. Rep. No. 357, 68th Cong., 1st Sess. p. 2):

At the present time it is the policy of the department as one means of control of fishing to grant a limited number of fishing permits within any designated area and to exclude all others from fishing rights therein. Your committee does not question the purpose of the department in this regard, but it has reached the unanimous and positive opinion that this practice of granting exclusive fishing privileges should cease and in this section it is declared that all regulations authorized to be made shall be of general application and that no exclusive or several right of fisheries shall be granted, nor shall any citizen be denied the right to take fish in waters where fishing is permitted. This declaration of policy and prohibition of law was earnestly urged upon the committee by the Delegate from the Territory, Mr. Sutherland, and has the general support of the people of the Territory.

Senator White, author of the bill, stated (65 Cong. Rec. 5974):

The Committee inserted this provision in order to do away with that exclusive right of fishing and to insure to every citizen of the United States equality of right and equality of opportunity.

The contention of the appellant is that Congress in the 1936 amendment of the Wheeler-Howard Act reversed the non-monopoly policy in Alaska fisheries and authorized the Secretary to create a series of monopolies of the Alaska fishing waters. This the Secretary proceeded to do, beginning in

1943, after waiting seven years after the claimed authorization was enacted. Typical of these monopolies to the Indian citizens is that to the Karluk Indians here in question, about which the facts are undisputed.

A group of fifty families of Indians inhabit the village of Karluk. Their men were trappers and fishermen. How few trapped and fished is evidenced by the fact that in 1944 but 57 persons were eligible to vote to organize under the amended Wheeler-Howard Act, *supra*. Their men operated fish nets owned by the Alaska Packers Association in which they caught salmon by mooring one end of the net to a shore post and drawing the net across the salmon stream moving towards the Karluk River and its upper spawning beds. They also fished for salmon from their own boats. Their catch was sold to the Alaska Packers' plant on the Karluk spit and to the appellee packers having plants elsewhere on Kodiak Island. They also were employed by the appellee canners on their boats, being paid, as the white fishermen, at so much per fish. In the non-fishing season they were employed by the local Alaska Packers' plant.

There is no evidence that the catch of the white fishermen in the waters sought to be reserved for the Indians in any way lessened the catch of the fifty Indian families or the wages they earned. It is fair to assume that since six hundred-odd white fishermen used these waters without interfering with each other, the 57 Indian fishermen would find no greater interference. Indeed, so far as their purchasing power is concerned, it well may be that it was much higher than before the white men established their plants on Kodiak Island.

To this Indian group the Secretary's instant Public Land Order 128 undisputably gave 35,000 acres, over 50 square miles, of upland "public lands" bordering on 15 miles of Shelikof Strait, the western boundary of Kodiak Island. The area of upland so reserved for the fifty families of the Karluk Indians is not questioned. The average for each family is over 700 acres, that is over four times the size of the homestead entry permitted to Indians in Alaska. 34 Stat. 197, 48 USCA 357.

The Secretary's order also purports to give a fishing monopoly of the entire area of the waters in which the salmon

stream to the Karluk River may be caught. This fishing monopoly is created by treating as "public lands" of the United States an area below low water in Shelikof Strait 15 miles long by 3,000 feet wide. That is to say, 5,450 acres or over $8\frac{1}{2}$ square miles covering the fishing area of the salmon run into the Karluk River spawning beds. From this reservation, if valid, the appellant's brief properly claims there are excluded from trespass in its area all the 450 white fishermen shown to be hitherto employed there by the appellees, plus, say, 150 more by the large Alaska Packers' plant on Karluk spit.

In the last season of 1946 the white fishermen of appellees caught 3,920,789 salmon in the purportedly monopolized area which were processed for the American food supply. To this must be added the large amount of the Alaska Packers. Appellees' capital investment in plant and equipment, dependent in large part on these salmon, is \$2,075,000. Plus this is the capital investment of the Alaska Packers' Karluk plant. The value of the appellees' enterprises as going concerns is so large that it requires a pre-season expenditure of \$1,515,000 and the employment as processors in the packing plants of appellees alone of 624 employees.

If this fishing monopoly exists, the Wheeler-Howard Act permits the sale to the white fishermen of rights to share in it. It is obvious that what the Karluk community monopoly could extract from these food producers for the right to employ its fishermen in these monopolized waters well could be more than enough to comfortably sustain these Indians without any fishing or trapping at all.

Here is not the President's but the withdrawing power of the Secretary of the Interior, a subordinate officer, which is in question and it is in connection with a statute which confers withdrawal power not in the general language of "lands of the United States" but only over "public lands." The phrase "public lands" has been confined to a limited class of lands through a long line of Supreme Court decisions which always have distinguished them from other lands of the United States, and which hold that "public lands" do not include the lands below low-water mark of ocean waters. These cases require the de-

termination whether the word "public" before the word "lands" gives the phrase "public lands" a specific meaning which does not include such ocean waters and whether Congress would have placed it there if it intended to include such waters, since by omitting the word "public" the word "lands" by itself would have included them. The applicable principle is that restated from many prior decisions in *Ex parte Public Bank*, 278 U. S. 101, 104,

No rule of statutory construction has been more definitely stated or more often repeated than the cardinal rule that significance and effect shall, if possible, be accorded to every word. As early as in Bacon's Abridgment, sec. 2, it was said that "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant."

The same in *Washington Market Co. v. Hoffman*, 101 U. S. 112, 115.

The principle so stated is always applicable. Here it is the more so in determining whether Congress intended to reverse its anti-monopoly legislation in Alaska fishing in an amendment to an Act in neither of which ocean waters or fishing are mentioned, and upon which nothing concerning ocean waters or fishing appears in the committee reports.

That the all inclusive word "lands" in a statute or a treaty providing for a reservation of "lands" for Indians includes such navigable waters, has been clearly established. In *Alaska Pacific Fisheries v. United States*, 248 U. S. 78, 79, it was held that under a Congressional statute specifically creating for the Metlakahtla Indians a reservation of "the body of lands known as Annette Islands situate in Alexander Archipelago in South-eastern Alaska" included the fishing grounds in the adjacent navigable waters and upheld regulations implementing the legislation which gave an exclusive right of fishery to the Indians in an area extending 3,000 feet from the shore line.

So also where Congress enacted that the President should set apart as Indian reservations in California "four tracts of land within the limits of said state," the President was empowered

to include in a reservation of the land the bed of the Klamath River even assuming, which was contested, that the river was navigable. *Donnelly v. United States*, 223 U. S. 243, 260, 262.

This court held of the treaty of 1855 with the Quillayute Indians of which Article II provided for a reservation to them of "a tract or tracts of land sufficient for their wants within the Territory of Washington," that the treaty, so using the word "land," warranted a presidential reservation of the tidelands on the ocean beach of the Quillayute River and of the navigable waters of that river for a distance of over a mile above its mouth. *Moore v. United States*, 157 F. 2d 760 (CCA-9), cert. den. 330 U. S. 827. So also we held of the word "lands" in the provision of the Act of 1884 that Alaska "Indians or other persons shall not be disturbed in the possession of any lands actually in their use or occupation" that "lands" included "tidelands" so in use. *Heckman v. Sutter*, 119 Fed. 83, 88 (CCA-9).

Since the use of the word "lands" alone in Section 2 of the statute of 1936 would have given the Secretary of the Interior the power to reserve the ocean waters below low tide, we are required to give significance to the use by Congress of the word "public" before the word "lands" unless the phrase "public lands" has been determined to include lands of the United States in the ocean below low-water mark.

No such decision is cited by appellant and our search has revealed none. On the contrary, the decisions unanimously hold the phrase "public lands" to have an established meaning excluding such waters.

On December 11, 1935, a few months before Congress placed the qualifying word "public" before the word "lands" in Section 2 of the Act of 1936, the Supreme Court decided the case of *Borax, Ltd. v. Los Angeles*, 296 U. S. 10, 17. There, in holding that because the jurisdiction of the Department of the Interior's Land Department extended in preemption claims only to "the public lands of the United States" that body could not render a final decision that preemption claimed lands were not tidelands, the Court states at page 17,

Specifically, the term "public lands" did not include tidelands. *Mann v. Tacoma Land Co.*, 152 U. S. 273,

284. "The words 'public lands' are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws." *Newhall v. Sanger*, 92 U. S. 761, 763; *Barker v. Harvey*, 181 U. S. 481, 490; *Union Pacific R. Co. v. Harris*, 215 U. S. 386, 388.

This continued limiting construction of the phrase "public lands" as distinguished from the general word "lands" of the United States is thus seen to extend over sixty years' judicial consideration of our land laws.

In *Mann v. Tacoma Land Co.*, 153 U. S. 273, 284, Mann claimed title to certain tidelands in Commencement Bay in Puget Sound acquired by a location under scrip issued to one Valentine in lieu of lands claimed by him under a Mexican grant. This scrip was created by a special (not general) Act of Congress providing that Valentine or his succeeding holders of the scrip "may select and shall be allowed, patents for, an equal quantity of the unoccupied and unappropriated public lands of the United States." In holding that tidelands were not included in the phrase "public lands" the Supreme Court states,

There is nothing in the act authorizing the Valentine scrip, or in the circumstances which gave occasion for its passage, to make an exception to the general rule. It provided that the scrip might be located on the unoccupied and unappropriated public lands, but the term "public lands" does not include tide lands.^a As said in *Newhall v. Sanger*, 92 U. S. 761, 763; "The words 'public lands' are habitually used in our legislation to describe, such as are subject to sale or other disposal under general laws." See also *Leavenworth, etc., Railroad v. United States*, 92 U. S. 733; *Doolan v. Carr*, 125 U. S. 618.

The "general rule" referred to was that of *Shively v. Bowlby*, 152 U. S. 1. Unlike the use of the phrase "public lands" in the special legislation creating the Valentine scrip, the phrase was used in the "general legislation" of September 27, 1850 (9 Stat. 406), providing for a donation claim of "public lands" which the Supreme Court held did not include lands below high

water mark. That Act provided for a grant to "every white settler or occupant of the *public* lands. American half-breed Indians included," on certain conditions of occupancy and cultivation of the lands, of 320 acres if unmarried and an additional 320 acres to his wife if married to her before December 31, 1851. Despite this specific restriction of the legislation to the relatively few whites and half-breed Indians in Oregon in 1851, the Supreme Court states that the Oregon Donation Act is "general legislation" by which cannot be granted navigable waters adjoining such "public lands."

It is thus apparent that whether the Act of 1936 be regarded as general legislation for all the Indians in Alaska or special legislation for their benefit, the phrase "public lands" does not include ocean waters any more than in the special legislation for Valentine or the general legislation for the Oregon whites and half-breeds there in 1851. Nor is the rule of *Shively v. Bowlby* confined to legislation for *grants* of land. In the case of *United States v. Holt Bank*, 270 U. S. 49, 55, its principle was applied in determining that a *reservation* of the Chippewa Indians surrounding navigable Mud Lake, whose area of 5,000 acres is comparable to the area of navigable waters here involved, did not include that lake.

This court in *Heckman v. Sutter*, 128 Fed. 393, 394-395 (CCA-9), expressly distinguishes between the limited meaning of the phrase "public lands" as excluding ocean lands and distinguished that phrase from the phrase "any lands" of the Act of May 11, 1884, which it held included Alaska tidelands under the rule of *Shively v. Bowlby*, stating,

Nor is it reasonable to suppose that Congress intended the broad and comprehensive terms thus used by it to be limited by the interpretation put upon the term "public lands" in the general land laws, which it expressly provided should not be in force in Alaska

Despite the holding of the limited meaning of the word "public" before the word "lands" in the *Borax, Ltd.* case, decided shortly before the Act of 1936, and our decision in *Heckman v. Sutter*, last cited, it is claimed that Congress intended

that the latter Act must be construed as if the all-inclusive word "lands" alone were used. The argument is, in effect, that the coastal Indians of Alaska would be economically benefited if the word "public" were absent and since the Wheeler-Howard Act contemplates an economic benefit to them we must construe it without that adjective.

Of course, it could not be contended that the *only* economic benefit Congress could have contemplated was a reservation of ocean waters, for here we have a reservation of fifty square miles of upland. So also does a reservation of upland bordering on fishing waters give to the Indians exclusive access to such waters from their shore, both for the launching of their boats and for the posts upon which are attached their nets held by boats across the streams of fish in the navigable waters.

That it would be a *further* economic benefit to create fishing monopolies in the Indians and thus destroy the established packing industries or compel them to pay tribute to them is also obvious, but for the reasons stated we think that Congress did not so intend when it used the phrase "public lands" in the 1936 amendment. The attempt of the Secretary, beginning in 1943, to create the several monopolies in ocean waters as part of "public lands" does not constitute an administrative interpretation overcoming the sixty years of contrary interpretation of the Supreme Court. There is no error in the holding of the district court that such attempted reservation of ocean waters in Public Order 128 is invalid.

In reaching this conclusion we have had in mind that the packing corporations, whose thousands of fishermen have so increased the world's food production, are not to be regarded as eleemosynary institutions. The American way of the profit motive often leaves unjustly behind minority groups of lesser education and initiative. That the Alaska Indians have suffered in the past under the competitive system is obvious. That statutes for their relief should be liberally construed in their favor is well established. *Alaska Pacific Fisheries v. United States*, 248 U. S. 78. What we have held is no more than that Congress did not intend to give such monopoly creating power to the Secretary of the Interior by the particular 1936 amendment to the Wheeler-Howard Act which does not

concern the Alaska fisheries and in the consideration of which amendment the great food producers had no reason to participate and which could give no ground for their exclusion from their established fishing grounds, except by a construction of its language contrary to the construction of over half a century.

II. *The White Act does not permit a monopoly of fishing in these Indian citizens as a conservation measure.*—There is no merit in the contention that, even assuming the ocean waters not reserved, regulation 208.23 (r) is a valid method of conservation because, under the Secretary's direction, the licensees who share in the monopoly so may be limited that the balance between catch and reproduction of salmon is better maintained. The White Act gives the Secretary the wide discretion recognized in *Dow v. Ickes*, 123 F. 2d 909 (C. A. D. C.), but it plainly says that in seeking conservation "no exclusive or several right of fishery shall be granted" in a regulated area—and here exclusive rights are given to the 57 Indians and their favored white licensees. Six hundred American fishermen will be "denied the right to fish" which is given them wherever others are permitted under the White Act so to do.

Nor is there merit in the contention that this is a regulation giving a preference to resident as distinguished from non-resident fishermen held valid in many states. Here is boldly provided a sharing in the monopoly of a limited number of non-resident licensees, a purpose, the evidence shows, which was accomplished by the sale to them by the Indians of permits for the season of 1946.

Likewise with appellant's contention that appellees cannot obtain relief because some of them actually fished under the Indian permits in the 1946 season. Obviously, under the wrongful threat of appellant to seize their boats during that season, they would pay the Indians their exaction rather than lose a large part of the pre-season expenditures of \$1,515,000 which the district court found actually had been made. Action under such a threat cannot deprive appellees of the right to resist such threatened illegal action in succeeding seasons.

III. *The Secretary is not an indispensable party.*—It thus appears that appellees are not to be excluded from fishing in the Karluk salmon run either by the Secretary's purported

reservation of public lands under the Act of 1936 or by his purported conservation reservation of the Karluk fishing area under the White Act. In both cases the purported action was without any authority whatsoever. Since all power to act was absent, the Secretary was not merely abusing a discretion and hence required to be joined. The rule as stated for this circuit in *Neher v. Harwood*, 128 F. 2d 846, 849 (C. C. A. 9, 1942), cert. denied 317 U. S. 519, is

In the two former cases the superior officer had acted under a statute which was not attacked as unconstitutional, but it was contended that the superior had in some manner *abused his discretion* and in such circumstance it was held that he should be made a party to the action in order to defend his direction and regulations. Where he was *without authority to act at all* in the premises his actions assuming to authorize action by the subordinate were of no validity and left the subordinate as the actor subject to restraint. [*Italics supplied.*]

In that action, at page 849, we described *Colorado v. Toll*, 268 U. S. 228, as a case in which the superior was not necessarily joined because "he had no statutory authority whatsoever to issue the regulations complained of." So similarly *Berdie v. Kurtz*, 75 F. 2d 898 (C. C. A.-9).

The rule is similarly stated for the Sixth Circuit that where plaintiffs "are challenging the statutory power of the Administrator to promulgate the regulations in question * * * the Administrator was not an indispensable party to the action and the court had jurisdiction to proceed against the Administrator's subordinates." *Varney v. Warehime*, 147 F. 2d 238, 243 (C. C. A.-6), cert. denied 325 U. S. 882. See also in the Fourth Circuit, *Ainsworth v. Bar Ballroom Co.*, 157 F. 2d 97, and the Fifth Circuit, *Yarnell v. Hillsborough Packing Co.*, 70 F. 2d 435, 438.

Appellant contends that injunctive relief must be denied under our decision in *F. E. Harris Co. v. O'Malley*, 2 F. 2d 819 (C. C. A.-9). That, however, was not a case where a regulation of the Secretary of Commerce was claimed to be invalid.

The question there was sought to determine whether a particular salmon trap violated a regulation. In the instant case, the Secretary is held to have no authority to make the regulation the violation of which, if valid, would require the seizure and condemnation of the appellees' fishing boats and gear and the fine and imprisonment of their fishermen. The facts bring the case clearly within *Philadelphia Co. v. Stimson*, 223 U. S. 605, 621, where the contention was that the Secretary of War was without authority to make a regulation which, if valid, warranted prosecution for a misdemeanor, and it was held that if the regulation was invalid its enforcement could be enjoined. The doctrine is so restated in *Stark v. Wickard*, 321 U. S. 288, 290, 311, and in *Board of Governors v. Agnew*, 329 U. S. 441, 444. Cf. *Freeman v. Smith*, 44 F. 2d 703 (C. C. A.-9).

The decree of the district court is affirmed.

[Endorsed:] Opinion. Filed Nov. 21, 1947. As amended by Orders of November 25, 1947, and January 12, 1948. Paul P. O'Brien, Clerk.

In the United States Circuit Court of Appeals for the Ninth
Circuit

No. 11585

FRANK HYNES, REGIONAL DIRECTOR, FISH AND WILDLIFE
SERVICE, DEPARTMENT OF INTERIOR, APPELLANT

v.

GRIMES PACKING CO., ET AL., APPELLEES

DECREE

Appeal from the District Court for the Territory of Alaska,
Fourth Division.

This cause came on to be heard on the Transcript of the Record from the District Court for the Territory of Alaska, Fourth Division, and was duly submitted.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court, that the decree of the said District Court in this cause be, and hereby is affirmed.

[Endorsed.] Decree. Filed and entered November 21, 1947.
Paul P. O'Brien, Clerk.

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In the United States Circuit Court of Appeals for the Ninth
Circuit.

No. 11585

FRANK HYNES, ETC., APPELLANT

v.

GRIMES PACKING CO., ET AL., APPELLEES

CERTIFICATE OF CLERK, U. S. CIRCUIT COURT OF APPEALS FOR THE
NINTH CIRCUIT, TO RECORD CERTIFIED UNDER RULE 38 OF THE
REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing five hundred and fourteen (514) pages numbered from and including 1 to and including 514 to be a full, true and correct copy of the entire record excluding certain original exhibits of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of Hon. Philip B. Perlman, Solicitor General of the United States counsel for the appellant, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this sixth day of February 1948.

[SEAL]

(S) Paul P. O'Brien,
PAUL P. O'BRIEN,

Clerk.

Supreme Court of the United States

Order allowing certiorari

Filed April 5, 1948

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 613

FRANK HYNES, REGIONAL DIRECTOR, FISH AND
WILDLIFE SERVICE, DEPARTMENT OF THE IN-
TERIOR, PETITIONER

v.

GRIMES PACKING CO., KADIAK FISHERIES COM-
PANY, LIBBY, McNEILL & LIBBY, FRANK MC-
CONAGHY & CO., INC., PARKS CANNING CO., INC.,
SAN JUAN FISHING & PACKING CO., AND UGANIK
FISHERIES, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE NINTH
CIRCUIT

The Solicitor General, on behalf of petitioner,
prays that a writ of certiorari issue to review the
judgment entered in this case on November 21,
1947, by the United States Circuit Court of
Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the district court (R. 42-61) is
reported at 67 F. Supp. 43. The opinion of the
circuit court of appeals (R. 499-514) has not yet
been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered on November 21, 1947 (R. 515). The jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the Act of May 1, 1936, authorizing the Secretary of the Interior to set aside "public lands" in Alaska as Indian reservations, empowered him to include an area of tidelands and adjacent coastal waters in order that the natives might be secure in their fisheries and, if so, whether the White Act of June 6, 1924, which prohibits the Secretary of the Interior from granting exclusive rights of fishery in the waters of Alaska, forbids him from including an area of tidelands and coastal waters in an Indian reservation.

2. Whether the respondents have sufficient interest in the lands under the coastal waters of Alaska to maintain this suit and, if so, whether the Secretary of the Interior is an indispensable party to a suit seeking to enjoin enforcement of regulations made by him relating to Alaska fisheries when the sole defendant to the suit is the Regional Director of the Fish and Wildlife Service of the Department of the Interior.

3. Whether a court of equity may properly determine whether certain remedies will be appli-

cable if the plaintiffs trespass on certain property.

4. Whether a court may grant to respondents authority to fish in an area in which the Secretary of the Interior, under valid authority, has prohibited fishing because the Secretary permitted Alaskan Indians to fish in the area.

5. Whether the penal provisions of the White Act may be used to prevent unauthorized activities violating White Act provisions in an area set aside as an Indian reservation.

STATUTES INVOLVED

Section 2 of the Act of May 1, 1936, c. 254, 49 Stat. 1250, 48 U. S. C. 358a provides:

the Secretary of the Interior is hereby authorized to designate as an Indian reservation any area of land which has been reserved for the use and occupancy of Indians or Eskimos by section 8 of the Act of May 17, 1884 (23 Stat. 26), or by section 14 or section 15 of the Act of March 3, 1891 (26 Stat. 1101), or which has been heretofore reserved under any executive order and placed under the jurisdiction of the Department of the Interior or any bureau thereof, together with additional public lands adjacent thereto, within the Territory of Alaska, or any other public lands which are actually occupied by Indians or Eskimos within said Territory: * * *

Section 1 of the Act of June 6, 1924, c. 272, 43 Stat. 464, as amended, 48 U. S. C. 221-222,

commonly known as the White Act, provides in part:

for the purpose of protecting and conserving the fisheries of the United States in all waters of Alaska the Secretary of Commerce from time to time may set apart and reserve fishing areas in any of the waters of Alaska over which the United States has jurisdiction, and within such areas may establish closed seasons during which fishing may be limited or prohibited as he may prescribe. Under this authority to limit fishing in any area so set apart and reserved the Secretary may (a) fix the size and character of nets, boats, traps, or other gear and appliances to be used therein; (b) limit the catch of fish to be taken from any area; (c) make such regulations as to time, means, methods, and extent of fishing as he may deem advisable. From and after the creation of any such fishing area and during the time fishing is prohibited therein it shall be unlawful to fish therein or to operate therein any boat, seine, trap, or other gear or apparatus for the purpose of taking fish; and from and after the creation of any such fishing area in which limited fishing is permitted such fishing shall be carried on only during the time, in the manner, to the extent, and in conformity with such rules and regulations as the Secretary prescribes under the authority herein given: *Provided*, That every such regulation made by the Secretary of

Commerce shall be of general application within the particular area to which it applies, and that no exclusive or several right of fishery shall be granted therein, nor shall any citizen of the United States be denied the right to take, prepare, cure, or preserve fish or shellfish in any area of the waters of Alaska where fishing is permitted by the Secretary of Commerce.¹

STATEMENT

This action was instituted by the respondents on June 25, 1946, to enjoin the enforcement of a fishing regulation issued by the Secretary of the Interior with respect to certain tidelands and waters at the mouth of the Karluk River on Kodiak Island off the southern coast of Alaska and to have declared invalid a Public Land Order issued by the Secretary which included those tidelands and waters in a reservation for the Karluk Indians (R. 2-18). The only person named as defendant was petitioner Frank Hynes, the Regional Director for the Territory of Alaska of the Fish and Wildlife Service of the Department of the Interior.

The Karluk River, which empties into Shelikof Strait, is subject annually to large runs of salmon.

¹ The Secretary of the Interior succeeded the Secretary of Commerce in matters of fish control under the President's Reorganization Plan No. II of May 9, 1939, 53 Stat. 1431, submitted to Congress under the Reorganization Act of April 3, 1939, c. 36, 53 Stat. 561, and made effective July 1, 1939, by Joint Resolution of June 7, 1939, c. 193, 53 Stat. 813.

These salmon, returning from the sea, make their way to the headwaters of the river to spawn and die. On the west bank of the river, at its mouth, is located the Indian village of Karluk. The Karluk natives are Aleuts who have from time immemorial derived their livelihood from fishing, principally from these salmon runs. Their customary method of catching the salmon is by stationary nets operated from the beach, known as beach seines.

Several large commercial fishing and packing companies have located canneries on Kodiak Island some distance from Karluk. These companies send their boats into the Karluk area as well as to other fishing grounds on Shelikof Strait to catch salmon by purse seines from the boats. Among these companies are the respondents in this case most of whom had commenced fishing in the Karluk area in 1938 or thereabouts (R. 142, 185, 216, 239, 256); purse seining had been forbidden at the river's mouth for many years prior to 1938 because of the conflicting interests of the two types of fishing (R. 352-355, 361-363).

On May 22, 1943, the Secretary of the Interior issued Public Land Order No. 128, 8 F. R. 8557, wherein he set aside certain fast land on both sides of the mouth of the Karluk River including Karluk Village, "and the waters adjacent thereto extending 3,000 feet from the shore line at mean low tide * * * as an Indian reservation for the use and benefit of the native inhabitants of

the Village of Karluk, Alaska, and vicinity." This order was ratified by vote of the Indians, as required by the Act of May 1, 1936 (R. 462).

Commercial fishermen were informed of the establishment of the reservation and were advised that they could continue to operate in all reservation waters except for a restricted area at the mouth of Karluk River, which was reserved for native beach seiners (R. 126, 462-463). Markers were set out indicating the boundaries of this restricted area by the Karluk natives and officers of the Bureau of Indian Affairs (R. 124-127). However, commercial fishing continued in the restricted area in 1944 and 1945, respondents having instructed their fishermen to ignore the markers (R. 127).

Subsequently, on March 22, 1946, the Secretary of the Interior issued Alaska Fisheries Regulation 208.23 (r), Title 50, C. F. R. 11 F. R. 3105 (R. 32-33). This regulation set apart the same waters as were included within the reservation created earlier by Public Land Order No. 128 as a reserved fishing area and closed it to all fishing except by natives in possession of such reservation and persons fishing under authority granted by those natives. The regulation consisted of two parts. First, it set forth a general prohibition against commercial fishing in the reservation area pursuant to the provisions of the White Act, which provides, *inter alia*, for fine or imprisonment of

violators of the regulations and forfeiture of gear used in the violation. The second paragraph of the regulations waived the general prohibition in the case of fishing by the Karluk natives and their permittees, reference being made to the 1936 Act.

On June 25, 1946, the appellees filed their complaint for injunctive relief against the enforcement of Fisheries Regulation 208.23 (r) and for a declaration that Public Land Order No. 128, creating the Karluk Reservation, is invalid insofar as it includes tidal waters. An *ex parte* restraining order was granted on June 26, 1946 (R. 37). On July 8, 1946, a hearing was held, following which the district court on July 18, 1946, filed a written opinion and granted a preliminary injunction (R. 37, 42). Referring to the dictionary definition of "land" the court concluded that the Act of May 1, 1936, did not authorize the Secretary of the Interior to include tidelands or other lands under water within an Indian reservation (R. 45-57). It further held that the fishery regulation of 1946 was "contrary to the common and statutory law, and therefore is invalid" (R. 58-59). Finally, the court ruled that neither the United States nor the Secretary of the Interior was an indispensable party to this suit (R. 59-60).

² This regulation was amended on August 27, 1946, 11 F. R. 9528, by adding "Such authority shall be granted only by or pursuant to ordinance of the Native Village of Karluk, approved by the Secretary of the Interior or his duly authorized representative."

Thereafter, trial was had on October 28, 1946, the evidence relating for the most part to the facts concerning the investment in and the size of the canneries and the fishing business of the plaintiffs and injuries which they claimed would follow from enforcement of the regulations. These facts were summarized by the court in its findings (R. 24-29). While the findings do not so state, it also appeared that the fishermen had obtained permits from the natives permitting them to fish in the reservation waters so long as they did not interfere with native beach seining (R. 128). Conclusions of law in accordance with the court's earlier opinion were entered (R. 39) and, on November 6, 1946, a permanent injunction was filed (R. 40-42).

The circuit court of appeals affirmed. It concluded that the 1936 Act did not authorize the inclusion in an Indian reservation of lands below low water mark when the reservation has been created out of public lands; that the regulation was therefore not valid under the White Act; and that the Secretary of the Interior was not an indispensable party to the suit.

The opinion below states that there was no evidence that the fishing of the white men lessened the catch of the natives (R. 305). But the natives testified that respondents' operations interfered with the native beach seine (R. 352, 360) and stated that if the boats had kept out of the area the natives could have caught more fish (R. 361). The catch at Karluk declined 75% from the period 1888-1897 to the decade 1927-1936. *Fluctuations in Abundance of Salmon of the Karluk River, Alaska* Fishery Bulletin No. 39.

REASONS FOR GRANTING THE WRIT

1. In *Alaska Pacific Fisheries v. United States*, 248 U. S. 78, 37, this Court based construction of a statute similar to the 1936 Act upon consideration of the circumstances in which the Indian reservation was created, particularly "the situation and needs of the Indians and the object to be attained." The court below adopted no such approach but instead rested its conclusion solely on a literal construction of the phrase "public lands". It stated (R. 508):

Since the use of the word "lands" alone in Section 2 of the statute of 1936, would have given the Secretary of the Interior the power to reserve the ocean waters below low tide, we are required to give significance to the use by Congress of the word "public" before the word "lands" unless the phrase "public lands" has been determined to include lands of the United States in the ocean below low water mark.

The court then applied the rule of *Borax Ltd. v. Los Angeles*, 296 U. S. 10, 17, and similar cases, that the expression "public lands," when used in the general land laws, does not embrace tidelands and lands under navigable waters.¹

¹The opinion below refers throughout to land below low water mark and states (fn. 1, R. 499) that the injunction and present litigation are not concerned with rights between high and low water. The injunction relates to land below mean low tide (R. 41) but the conclusions of law of the trial court stated (R. 39) that the order establishing the reservation was invalid "insofar as the same purports to cover or embrace the

This holding ignores legislative enactments in *pari materia*, the administrative construction of similar statutes, and court decisions all of which demonstrate that the phrase "public lands" in the 1936 Act includes submerged lands. Because of the physical situation in Alaska, Congress by the Act of May 17, 1884, c. 53; 23 Stat. 24, provided that "the general land laws of the United States" should not apply to Alaska and that "Indians and other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them" (sec. 8). This provision includes tidelands as well as lands above the high water mark. *Sutter v. Heckman*, 1 Alaska 188; *Heckman v. Sutter*, 128 Fed. 393, 395 (C. C. A. 9); *Miller v. United States*, 159 F. 2d 997 (C. C. A. 9). Contrary to the holding of the court below, the phrase "public lands" when used in legislation relating to Alaska has the same comprehensive meaning as the word "lands" alone. The adjective "public" in the context of Alaskan legislation simply means "not private". This clearly appears from an analysis of the Act of March 3, 1891, c. 561, 26 Stat. 1095. Section 12 of that Act provides that persons "now or hereafter in possession of and occupying public lands in Alaska

ocean or tidal waters below mean high tide." The theory of the court below, that the *Borax* case and similar decisions are controlling, would exclude tidelands, i. e., lands below high water mark, from the reservation.

for the purpose of trade or manufactures" might secure patents to 160 acres and section 13 provides the machinery for such purchases. Section 14 then sets forth various exceptions to sections 12 and 13 including lands occupied by Indians and concludes—

there shall be reserved in all patents issued under the provisions of the last two preceding sections the right of the United States to regulate the taking of salmon and to do all things necessary to protect and prevent the destruction of salmon in all the waters of the lands granted frequented by salmon.

This provision, and the other exceptions of section 14, show that "public lands" in section 12 were not limited to uplands but included tide-lands and lands under water. See also Act of July 3, 1926, c. 745, 44 Stat. 821, 48 U. S. C. 360.

The administrative understanding that "public lands" in Alaska included submerged lands is demonstrated by Proclamation No. 39, dated December 24, 1892, which set aside Afognak Island and lands within one mile from the shore thereof for fish culture purposes. 27 Stat. 1052. And, almost immediately after passage of the 1936 Act, the Department of the Interior considered the various problems raised thereby and the Acting Solicitor concluded that waters within 3,000 feet of upland might be included in the reservation. 56 L. D. 110. This construction has

been followed consistently not only in later opinions; 57 I. D. 461, but also by the action of the administrative officers establishing other reservations. Order of May 20, 1943, 8 F. R. 7731 (Akutan); Order of June 19, 1943, 8 F. R. 9464 (Wales); Order of April 22, 1946, 11 F. R. 6143 (Little Diomedé).

When the occasion has arisen, the courts have given the phrase "public domain" a similar meaning with reference to Alaska. In *Alaska Gold Recov. Co. v. Northern M. & T. Co.*, 7 Alaska 386, 398, the court referred to submerged lands as part of the "public domain." And more recently in *Dow v. Ickes*, 123 F. 2d 909, 914 (App. D. C.), certiorari denied, 315 U. S. 807, the court referred to the White Act regulatory authority which relates solely to fishing and stated: "The power given is appropriate for the regulation of activities upon the public domain, having as their object the reduction of public property to private use." Thus, undoubtedly because of the importance of waters in Alaska and because the general land laws have not been applied there, both Congress, the executive officials and the courts have not applied the usual rule but have used the terms "lands," "public lands" and "public domain" interchangeably in referring to submerged land owned by the Government in Alaska. It follows that the word "public" in the 1936 Act (which specifically referred to the 1894 Act) did not limit the lands described to upland.

The decisions such as *Borax Ltd. v. Los Angeles*, 296 U. S. 10, 17, on which the decision below is based are not apposite here since they do not deal with public lands in Alaska which, as we have shown, have been placed in a special category because of the unique conditions prevailing there. In addition, those decisions all relate to statutes providing for disposal of property of the United States. The 1936 Act did not authorize disposal but simply a reservation of the lands for a particular governmental use, i. e., protection and assistance of the Indians. This Court emphasized the importance of this distinction in *Alaska Pacific Fisheries v. United States*, 248 U. S. 78, 88, saying:

The reservation was not in the nature of a private grant, but simply a setting apart, "until otherwise provided by law," of designated public property for a recognized public purpose—that of safeguarding and advancing a dependent Indian people dwelling within the United States.

The court below thought that the decision in *United States v. Holt Bank*, 270 U. S. 49, shows that there is no distinction between the construction to be given a disposal act and a reservation act. But in that case the question was not, as here, whether a reservation of public property for this particular purpose was valid, but rather whether existence of the reservation "operated as a disposal of lands underlying navigable waters within its limits" 270 U. S. at p. 58.

Both the courts and Congress have long recognized that the Indians of Alaska are largely, if not completely, dependent on fishing for their livelihood.⁵ As Alaska Delegate Sutherland said, quoting an Indian leader, 72 Cong. Rec. pt. 2, p. 1202:

"There are no people who have a greater right to demand of Congress that its rights be protected than the natives of Alaska. We live on fish and have lived on fish as our principal source of food for centuries. Today we still live on fish; we buy our clothing with fish, support our families with fish, educate our children with fish, and bury our dead from that source."

The Secretary of the Interior urged adoption of the 1936 Act in order to fulfill the Government's obligations, "in the protection of the economic rights of the Alaska natives." H. Rep. No. 2244, 74th Cong. 2d Sess., pp. 3-5; S. Rep. No. 1748, 74th Cong. 2d Sess. pp. 3-4. The overwhelming importance of fisheries in connection with Alaskan Indians is well illustrated by the fact that the natives of the Karluk Tribe live solely by fishing

⁵ See *Heckman v. Sutter*, 119 Fed. 83 (C. C. A. 9); Act of June 14, 1906, c. 3299, 34 Stat. 263; Act of June 6, 1924, c. 272, secs. 4, 5, 43 Stat. 464, 466, 48 U. S. C. 232, 234; Act of April 16, 1934, c. 146, 48 Stat. 594, 48 U. S. C. 233.

See also 72 Cong. Rec. pt. 3, p. 2408; 75 Cong. Rec. pt. 1, p. 60; Senate Joint Memorial 1, 77 Cong. Rec. pt. 1, pp. 1056, 1069; Hearings, H. Committee on Indian Affairs, H. R. 7902, 73rd Cong. 2d Sess. pp. 76, 498.

(R. 348.)¹ A reservation limited to frozen uplands in Alaska would have been of very little benefit to those natives. It is absurd to suppose that Congress thought, as the court below suggested (R. 5, 11), that use of the uplands for launching boats and for posts to which to attach nets would constitute adequate protection of the economic rights of the Indians.

It was considerations such as these that led this Court to conclude in *Alaska Pacific Fisheries v. United States*, 248 U. S. 78, that under section 15 of the Act of March 3, 1891, 26 Stat. 1101, the reservation properly included waters and submerged land adjacent to the Annette Islands. We submit that the considerations which led to that decision apply with at least equal force to the 1936 Act, which was aimed at protecting all the Government's wards in Alaska.

The court below seems to have thought that the "anti-monopoly" provision of the 1924 White Act operated to prohibit the inclusion of fishing waters in Indian reservations and that the 1936 Act should not be construed as a reversal of this policy. But the "anti-monopoly" provision does not purport to limit the authority under other statutes to reserve public property for particular uses, such as Indian fishing reserves. Cf. *United*

¹ The trial court excluded additional evidence offered by petitioner to show that the natives of Karluk depend on fishing and that the upland was of little economic value to them (R. 349-350; 366).

States v. Wyoming, 331 U. S. 440. It is on its face simply a limitation upon the regulations that may be issued under the White Act. It provides—

That every *such regulation made by the Secretary of the Interior* shall be of general application within the particular area *to which it applies*, and that no exclusive or several right of fishery shall be granted *therein*, nor shall any citizen of the United States be denied the right to take, prepare, cure, or preserve fish or shellfish in any area of the waters of Alaska where fishing is permitted by the Secretary of the Interior. [Italics supplied.]

The legislative history of the Act demonstrates that it was not intended to tie the Government's hands in making provision for the economic protection of its Indian wards in Alaska. It was not intended to prohibit Indian fishery reserves. At the time the Act was passed many Indian reservations had been established in which exclusive control over adjacent waters was asserted on behalf of the natives. See 49 L. D: 592, concluding that a lease of fishing privileges within the Tyonek Reservation might be made on behalf of the Indians.* The representatives of the

* See also Proclamation No. 1332, April 28, 1916, 39 Stat. 1777 (Annette Island Fishery Reserve); Executive Order No. 6044, February 23, 1933 (Amaknak); Executive Order No. 1555, June 19, 1912 (Hydaburg); Executive Order 2228, August 2, 1915 (Chilkat). The validity of the Annette Island

Indians were among the foremost sponsors of the White Act and their interests were recognized by those concerned. See 65 Cong. Rec. pt. 6, pp. 5973-5975; *id.* pt. 10, p. 9688; Hearings, H. Com. on Merchant Marine and Fisheries, H. R. 2714, 68th Cong. 1st Sess.; Alaskan Territorial Fish Commission, *Conservation of the Fisheries of Alaska*, August 1923. As originally drafted the anti-monopoly provision was in broad terms providing that no exclusive right of fishery might be granted "by the Secretary of Commerce, the Alaska Territorial Legislature, the Alaska Fish Commission or any other constituted authority except the United States Congress." H. R. 4826, 68th Cong. 1st Sess. An exception was made, however, in the case of Indians. When the bill was amended so that the "anti-monopoly" provision only applied to White Act regulations the exception of Indians became unnecessary and was omitted. In accord with this history, the administrative officers construed the White Act as not affecting Indian fishing reserves. See Department of Commerce, *Laws and Regulations for Protection of Fisheries of Alaska*, (Dept. Circular No. 251, 10th ed.) June 21, 1924, pp. 5-6; see also Executive Order No. 6044, February 23,

Proclamation was upheld by the court in *Alaska Pacific Fisheries v. United States*, 240 Fed. 274 (C. C. A. 9), which was affirmed by this Court on other grounds. The validity of the reservation was recognized in the Act of May 7, 1934, c. 221, 48 Stat. 667, 8 U. S. C. 601 note.

1933, establishing a native fishery reserve at Amaknak Island.

2. The questions presented have large importance for the Department of the Interior, which has responsibility for the protection of the natives and the conservation of natural resources. The issues affect not only the Karluk Indians but the many other natives for whom reservations have been or may in the future be established under the 1936 Act, which is the primary legislation on Alaskan native affairs. The opinion below has even broader implications since it holds that the expression "public lands" cannot include tidelands and submerged lands when it appears in any statute relating to Alaska. Doubt is cast, therefore, upon the validity of many other reservations, such as the Afognak fish culture reserve. And the construction given to the White Act throws doubt upon the validity of the many Indian fishery reserves that have been established both before and after passage of the Act. It is submitted that the decision of the court below is erroneous and is in conflict with applicable decisions of this Court, especially *Alaska Pacific Fisheries v. United States*, 248 U. S. 78.

3. If it is concluded that the Secretary of the Interior was authorized to include the submerged lands in the Indian Reservation, it would follow, we submit, that the issuance of the injunction was erroneous since respondents would then be trespassers and would have no standing to invoke the equity powers of the court. In any event, if this

petition for a writ of certiorari is granted we shall urge that the remedies of the White Act can properly be applied under the circumstances of the instant case.

4. Moreover, regardless of validity of the order establishing the Indian Reservation, questions which are of importance in administering the White Act are presented. In *Dow v. Ickes*, 123 F. 2d 909 (App. D. C.), certiorari denied, 315 U. S. 807, the court held that even if the claim there asserted that the Secretary of the Interior had violated the "anti-monopoly" provision in allocating trap sites was valid, the court could not compel the Secretary to permit the claimant to fish there. In the instant case the Secretary's order in its first paragraph closed the area to fishing and in the second paragraph stated an exception in favor of the Indians (R. 32-33). Even if the exception violated the White Act, the court was not thereby authorized to compel the Secretary to permit respondents to fish there. Yet that is precisely what the injunction does. The decision below is, in this respect, in conflict with the decision in *Dow v. Ickes*.

5. A question closely allied to the one just discussed is presented in determining what standing respondents had to institute this suit. Respondents did not possess any property right in the lands in question nor did they own a right of fishery. Indeed, their case rests on the premise that because of the White Act no one can be given an exclusive or special right of fishery. But it is well

settled that a person has no cause to complain when his legal rights are not violated even though he is damaged, and that there is no general right of citizens to enforce the public statutes. *Alabama Power Co. v. Ickes*, 302 U. S. 464; *Tennessee Power Co. v. Tennessee Valley Authority*, 306 U. S. 118, 139-140; *United States v. Midwest Oil Co.*, 236 U. S. 459, 471. A substantial question arises, therefore, as to whether, like the Public Contracts Act considered in *Perkins v. Lukens Steel Co.*, 310 U. S. 113, 127, the anti-monopoly provision of the White Act was intended to be a bestowal of litigable rights upon all citizens who desired to fish or was "a self-imposed restraint for violation of which the Government—but not private litigants—can complain."

6. Finally, a substantial question exists as to whether, under the principles announced by this Court in *Williams v. Fanning*, O. T. 1947, No. 47, the validity of the order of the Secretary of the Interior establishing the Karluk Indian Reservation can be decided in this case, where the sole defendant was the Regional Director of the Fish and Wildlife Service.

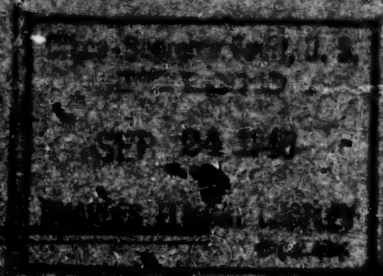
CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

FEBRUARY 1948.

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SUPREME COURT, U.S.



In the Supreme Court of the United States

OCTOBER TERM, 1943

FRANK HEWES, REGIONAL DIRECTOR, FISH AND
WILDLIFE SERVICE, DEPARTMENT OF THE INTERIOR,
PETITIONER

GRIMM PACKING CO., KADIAK FISHERIES COMPANY,
LIBBY, McNEEL & LANE, FRANK MCCORMICK &
CO., INC., PACIFIC CRABBER CO., INC., SAN JUAN
FISHING & PACKING CO., and COASTAL FISHERMEN
INC.,

ON WRIT OF HABEAS CORPUS TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

DEEDS FOR THE PETITIONER

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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 24

FRANK HYNES, REGIONAL DIRECTOR, FISH AND
WILDLIFE SERVICE, DEPARTMENT OF THE INTERIOR,
PETITIONER

v.

GRIMES PACKING CO., KADIAK FISHERIES COMPANY,
LIBBY, MCNEILL & LIBBY, FRANK MCCONAGHY &
CO., INC., PARKS CANNING CO., INC., SAN JUAN
FISHING & PACKING CO., AND UGANIK FISHERIES,
INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the district court (R. 42-61) is reported at 67 F. Supp. 43. The opinion of the court of appeals (R. 499-514) is reported at 165 F. 2d 323.

JURISDICTION

The judgment of the court of appeals was entered on November 21, 1947 (R. 515). The petition for a writ of certiorari was filed on February

20, 1948, and was granted on April 5, 1948 (R. 517). The jurisdiction of this Court rests on section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (now 28 U. S. C. 1254).

QUESTIONS PRESENTED

1. Whether the Act of May 1, 1936, authorizing the Secretary of the Interior to set aside "any area of land" or "public lands" in Alaska as Indian reservations, empowered him to include an area of tidelands and adjacent coastal waters in order that the natives might be secure in their fisheries and, if so, whether the White Act of June 6, 1924, which prohibits the Secretary of the Interior from granting exclusive rights of fishery in the waters of Alaska, forbids him from including an area of tidelands and coastal waters in an Indian reservation.

2. Whether the Secretary of the Interior is an indispensable party to a suit seeking to enjoin enforcement of regulations made by him relating to Alaska fisheries and an Indian reservation, when the sole defendant to the suit is the Regional Director of the Fish and Wildlife Service of the Department of the Interior.

3. Whether the jurisdiction of a court of equity may properly be invoked by the respondents to determine whether the sanctions of the White Act may be applied as a consequence of the respondents' trespass on the property in question.

4. Whether the penal provisions of the White Act may be used to prevent unauthorized activities violating White Act provisions in an area set aside as an Indian reservation.

STATUTES INVOLVED

Section 2 of the Act of May 1, 1936, 49 Stat. 1250, 48 U. S. C. 358a provides:

the Secretary of the Interior is hereby authorized to designate as an Indian reservation any area of land which has been reserved for the use and occupancy of Indians or Eskimos by section 8 of the Act of May 17, 1884 (23 Stat. 26), or by section 14 or section 15 of the Act of March 3, 1891 (26 Stat. 1101), or which has been heretofore reserved under any executive order and placed under the jurisdiction of the Department of the Interior or any bureau thereof, together with additional public lands adjacent thereto, within the Territory of Alaska, or any other public lands which are actually occupied by Indians or Eskimos within said Territory: *Provided*, That the designation by the Secretary of the Interior of any such area of land as a reservation shall be effective only upon its approval by the vote, by secret ballot, of a majority of the Indian or Eskimo residents thereof who vote at a special election duly called by the Secretary of the Interior upon thirty days' notice: * * *

Section 1 of the Act of June 6, 1924, 43 Stat. 464, as amended, 48 U. S. C. 221-222, commonly known as the White Act, provides in part:

for the purpose of protecting and conserving the fisheries of the United States in all waters of Alaska the Secretary of Commerce from time to time may set apart and reserve fishing areas in any of the waters of Alaska over which the United States has jurisdiction, and within such areas may establish closed seasons during which fishing may be limited or prohibited as he may prescribe. Under this authority to limit fishing in any area so set apart and reserved the Secretary may (a) fix the size and character of nets, boats, traps, or other gear and appliances to be used therein; (b) limit the catch of fish to be taken from any area; (c) make such regulations as to time, means, methods, and extent of fishing as he may deem advisable. From and after the creation of any such fishing area and during the time fishing is prohibited therein it shall be unlawful to fish therein or to operate therein any boat, seine, trap, or other gear or apparatus for the purpose of taking fish; and from and after the creation of any such fishing area in which limited fishing is permitted such fishing shall be carried on only during the time, in the manner, to the extent, and in conformity with such rules and regulations as the Secretary prescribes under the authority herein given: *Provided*, That every such regulation made by the Secretary of Commerce shall be of general application within the particular area to which it applies, and that no exclusive or several right of fishery shall be granted therein, nor shall any citizen of the

United States be denied the right to take, prepare, cure, or preserve fish or shellfish in any area of the waters of Alaska where fishing is permitted by the Secretary of Commerce.¹

STATEMENT

This action was instituted by the respondents on June 25, 1946, to enjoin the enforcement of a fishing regulation issued by the Secretary of the Interior with respect to certain tidelands and waters at the mouth of the Karluk River on Kodiak Island off the southern coast of Alaska, and to have declared invalid a Public Land Order issued by the Secretary which included those tidelands and waters in a reservation for the Karluk Indians (R. 2-18). The only person named as defendant was petitioner Frank Hynes, the Regional Director for the Territory of Alaska of the Fish and Wildlife Service of the Department of the Interior.

The Karluk River, which empties into Shelikof Strait, is subject annually to large runs of salmon. These salmon, returning from the sea, make their way to the headwaters of the river to spawn and die. On the west bank of the river, at its mouth, is located the Indian village of Karluk. The Karluk natives are Aleuts who have from time immemorial derived their livelihood from fishing,

¹ The Secretary of the Interior succeeded the Secretary of Commerce in matters of fish control under the President's Reorganization Plan No. II of May 9, 1939, 53 Stat. 1431, submitted to Congress under the Reorganization Act of April 3, 1939, 53 Stat. 561, and made effective July 1, 1939, by Joint Resolution of June 7, 1939, 53 Stat. 813.

principally from these salmon runs. Their customary method of catching the salmon is by a net, known as a beach seine, one end of which is attached to the shore, the other being drawn by boats to deeper water at a considerable distance from the shore.

Several large commercial fishing and packing companies have located canneries on Kodiak Island some distance from Karluk. These companies send boats, some company, and others independently, owned (See, e.g., R. 176-177, 252-253), into the Karluk area as well as to other fishing grounds on Shelikof Strait to catch salmon by purse seines from the boats (R. 24-29). Among these companies are the respondents in this case, most of whom had commenced fishing in the Karluk area in 1938 or thereabouts (R. 142, 185, 216, 239, 256); purse seining had been forbidden at the river's mouth for many years prior to the middle thirties because of the conflicting interests of the two types of fishing (R. 216, 293, see *infra* note 23, pp. 54-55).

On May 22, 1943, the Secretary of the Interior issued Public Land Order No. 128, 8 F.R. 8557, wherein he set aside certain fast land on both sides of the mouth of the Karluk River, including Karluk Village "and the waters adjacent thereto extending 3,000 feet from the shore line at mean low tide * * * as an Indian reservation for the use and benefit of the native inhabitants of the Village of Karluk, Alaska, and vicinity." This order was

ratified by vote of the Indians, as required by the Act of May 1, 1936 (R. 462).

Commercial fishermen were informed of the establishment of the reservation and were advised that they could continue to operate in all reservation waters except for a restricted area at the mouth of Karluk River, which was reserved for native beach seiners (R. 126, 462-463). Markers were set out indicating the boundaries of this restricted area by the Karluk natives and officers of the Bureau of Indian Affairs (R. 124-127). However, commercial fishing continued in the restricted area in 1944 and 1945, respondents having instructed their fishermen to ignore the markers (R. 127).

Subsequently, on March 22, 1946, the Secretary of the Interior issued Alaska Fisheries Regulation 208.23 (r), Title 50, C.F.R., 11 F.R. 3105 (P. 32-33). This regulation set apart the same waters as were included within the reservation created earlier by Public Land Order No. 128 as a reserved fishing area. With respect to these waters, the regulation first set forth a general prohibition against commercial fishing pursuant to the provisions of the White Act which provides, *inter alia*, for fine or imprisonment of violators of the regulations and forfeiture of gear used in the violation. The second paragraph of the regulation waived the general prohibition in the case of fishing by the

tion was created—the power of Congress in the premises, the location and character of the islands, the situation and needs of the Indians and the object to be attained.

After investigating the circumstances, this Court concluded that “the body of lands known as Annette Islands” reserved for the Metlakatla Indians was not limited to dry land but also included adjacent submerged land. See also *Moore v. United States*, 157 F. 2d 760 (C.C.A. 9), certiorari denied, 330 U. S. 827 (submerged lands included in “tracts of land” set aside for use of Quillayute Indians). The Act of May 1, 1936, here in question, see *supra*, p. 14, is generally applicable to all Indians in Alaska. No proof is necessary to establish the fact that most of these Indians are primarily dependent upon fishing for their livelihood. Congress has repeatedly recognized that fact by exempting the Indians from the operation of acts restricting fishing. Act of June 14, 1906, 34 Stat. 263; Act of June 6, 1924, Secs. 4 and 5, 43 Stat. 464, 466, 48 U.S.C. 232, 234; Act of April 16, 1934, 48 Stat. 594, 48 U.S.C. 233. And the courts have acknowledged this Congressional understanding of the native economy. For example, in *Heckman v. Satter*, 119 Fed. 83, 88 (C.C.A. 9), it was stated: “The fact that at that time the Indians and other occupants of the country largely made their living by fishing was no doubt well known

Karluk natives and their permittees,² reference being made to the 1936 Act.

On June 25, 1946, the appellees filed their complaint for injunctive relief against the enforcement of Fisheries Regulation 208.23 (r) and for a declaration that Public Land Order No. 128, creating the Karluk Reservation, is invalid insofar as it includes tidelands and ocean waters (R. 14). An *ex parte* restraining order was granted on June 26, 1946 (R. 37). On July 18, 1946, a hearing was held, following which the district court, on July 18, 1946, filed a written opinion and granted a preliminary injunction (R. 37, 42). Referring to the dictionary definition of "land" the court concluded that the Act of May 1, 1936, did not authorize the Secretary of the Interior to include tidelands or other lands under water within an Indian reservation (R. 45-57). It further held that the fishery regulation of 1946 was "contrary to the common and statutory law, and therefore is invalid" (R. 58-59). Finally, the court ruled that neither the United States nor the Secretary of the Interior was an indispensable party to this suit (R. 59-60).

Thereafter, trial was had on October 28, 1946, the evidence relating for the most part to the facts

²This regulation was amended on August 27, 1946, 11 F.R. 9528, by adding, "Such authority shall be granted only by or pursuant to ordinance of the Native Village of Karluk, approved by the Secretary of the Interior or his duly authorized representative."

to the legislative branch of the government

* * *

The Karluk Indians, like other natives of Kodiak and the Aleutian chain of islands, are traditionally fishermen living almost exclusively on the returns from that vocation (R. 227, 233, 348-349, 358).⁵ For generations the Karluk Indians have fished in the mouth of the Karluk River, and along the two miles of beach in front of their village. *Report on the Salmon and Salmon Rivers of Alaska*, H. R. Misc. Doc. No. 211, Vol. 18, 51st Cong., 1st Sess., pp. 2, 13-20; *Report on the Population, Industries, and Resources of Alaska*, H. R. Misc. Doc. No. 42, pt. 8, Vol. 13, 47th Cong., 2d Sess., pp. 13, 71. More than a century ago it was recorded that in one season at Karluk, 300,000 red salmon were prepared as "Yukola" (i.e., dried without salting or smoking). *Statistical Review of the Alaska Salmon Fisheries*, Rich and Ball, Bulletin of U. S. Bureau of Fisheries, Vol. XLVI, Document No. 1102, p. 664. Nor were these fishing activities of the Karluks limited to taking fish exclusively for their own consumption. They were commercial fishermen.

⁵ The trial court excluded additional evidence offered by petitioner to show that the natives of Karluk depend on fishing and that the upland was of very little value to them (R. 349-350, 366). Cf. *Alaska-Pacific Fisheries v. United States*, 248 U. S. 78, 88-89: "While bearing a fair supply of timber, only a small portion of the upland is arable, more than three-fourths consisting of mountains and rocks. * * * The Indians could not sustain themselves from the use of the upland alone."

concerning the investment in, and the size of, the canneries and the fishing business of the respondents and injuries which they claimed would follow from enforcement of the regulations. These facts were summarized by the court in its findings (R. 24-29). While the findings do not so state, it also appeared that the fishermen had obtained permits from the natives permitting them to fish in the reservation waters so long as they did not interfere with native beach seining (R. 128). Conclusions of law in accordance with the court's earlier opinion were entered (R. 39) and, on November 6, 1946, a permanent injunction was filed (R. 40-42).

The court of appeals affirmed. It concluded that the 1936 Act did not authorize the inclusion in an Indian reservation of lands below low-water mark; that the regulation was therefore not valid under the White Act; and that the Secretary of the Interior was not an indispensable party to the suit. (R. 499-514.)

SPECIFICATION OF ERRORS TO BE URGED

The court of appeals erred:

1. In holding that the Act of May 1, 1936, does not authorize the Secretary of the Interior to include tide and submerged coastal lands as well as uplands in the Karluk Indian Reservation.

2. In holding that the Act of June 6, 1924, prohibits the Secretary of the Interior from granting

exclusive rights of fishery to the Karluk Indians in the waters included within their reservation.

3. In holding that the Secretary of the Interior was not an indispensable party to this suit.

4. In enjoining the use of the penal provisions of the Act of June 6, 1924, to prevent fishing in an area closed to fishing except by Indians.

5. In holding that Public Land Order No. 128 is invalid and granting an injunction against its enforcement.

6. In holding that Alaska Fisheries Regulation 208.23 (r) is invalid and granting an injunction against its enforcement.

7. In affirming the judgment of the district court.

SUMMARY OF ARGUMENT

I

The reservation by the Secretary of the Interior of coastal lands adjacent to Kodiak Island was sanctioned by the Act of May 1, 1936, whether authority be sought from the power to designate "any area of land" previously reserved or from the power to designate additional "public lands". The court below conceded that "any area of land" could include tide and submerged lands but mistakenly assumed that the Act required a prior formal reservation of the area rather than mere prior use by the Indians. Moreover, the phrase "public lands", when used in legislation relating

to Alaska, has the same comprehensive meaning as the word "lands" alone. This is made evident by previous legislative, judicial, and administrative usage of the phrase. The provision in the Organic Act of 1884 making inapplicable to Alaska "the general land laws of the United States" serves to distinguish the contrary interpretation put on "public lands" by such cases as *Borax Ltd. v. Los Angeles*, 296 U. S. 10. In addition, this line of cases related to disposal of property, not merely the setting aside of portions of the public domain.

This textual analysis of the Act of May 1, 1936, is confirmed by the circumstances giving rise to its enactment. Congress has been vividly apprised of the fact that the Karluk Indians, like most Alaskan natives, depend almost entirely on fishing for their livelihood. The Act of 1936 was passed to protect "the economic rights of the Alaska natives." Such protection can be afforded only by including within Indian reservations submerged coastal lands underlying fisheries, a fact which has been constantly recognized administratively.

Nothing in the White Act of June 6, 1924, stands in the way of utilization of the powers granted in the Act of 1936 to grant fishery rights to Alaskan Indians. Its ban on an exclusive right of fishery was directed not at a reservation of public property for the public purpose of protecting Indian wards but at private monopolies which had

previously been allowed to exist. When the White Act was passed, the Federal Government asserted for several native groups the right of exclusive control over waters adjacent to their settlements. There was no suggestion, when the White Act was under consideration and after its passage and administrative implementation had begun, that such Indian rights were affected by the Act. Indeed, it was the representatives of the Alaskan Indians who were instrumental in persuading Congress to pass the anti-monopoly provision; it would be anomalous now to turn it against them. In any event, to the extent of any inconsistency, the White Act of 1924 was superseded by the Act of 1936.

II

If the relief sought here is granted, it will "expend itself on the public * * * domain or interfere with the public administration." *Williams v. Fanning*, 332 U. S. 490, 493. The Secretary will be required to make some other provision for fish conservation and for adjustment of the rights of the natives and other interested parties. In a suit in which such consequences will follow upon a judgment for the plaintiff, the Secretary is an indispensable party. Certainly, a suit in which the validity of an Indian reservation is adjudicated should not be permitted to proceed when the only defendant is an officer having nothing whatever to do with Indian affairs.

III

As trespassers on a lawfully established Indian reservation, the respondents may not enlist the aid of a court of equity to adjudge the legality of the application of White Act remedies for such trespasses. It is not the function of a court of equity to advise wrongdoers as to what penalties may lawfully be imposed upon them in advance of their intended future trespasses.

In any event, the penal provisions of the White Act may properly be invoked in the circumstances of this case. The grant of an exclusive right of fishery to Indians and their licensees is not inconsistent with the equality provisions of the White Act. That Act, of necessity, contemplates reasonable discriminations, and the special interest of the Karluks in the area affords reasonable basis for the preferential right granted them by the Secretary. Moreover, the fishing regulation in question is justifiable as a reasonable exercise of the Secretary's discretionary power to make regulations in aid of conservation. Differentiations between residents and non-residents are found in the fishing or hunting conservation laws of every State in the Union and every Canadian province, as well as in Alaska itself. The concern of the local population with protection of its fish and game supply is obviously greater than that of outsiders who can and do strike at one source

of supply and then another, exhausting each in turn.

ARGUMENT

I

THE KARLUK INDIAN RESERVATION, PROPERLY INCLUDED LANDS UNDER WATER

A. The Act of May 1, 1936, authorized the Secretary of the Interior to include coastal waters as well as uplands in the Karluk Indian Reservation.

Public Land Order No. 128, 8 F.R. 8557, by which the Secretary of the Interior set aside the Karluk Reservation, including waters adjacent to the fast land, is based on the Act of May 1, 1936, 49 Stat. 1250, 48 U.S.C. 358a, Section 2 of that Act authorizes the Secretary

to designate as an Indian reservation *any area of land* which has been reserved for the use and occupancy of Indians or Eskimos by section 8 of the Act of May 17, 1884 (23 Stat. 26), or by section 14 or section 15 of the Act of March 3, 1891 (26 Stat. 1101), or which has been heretofore reserved under any executive order and placed under the jurisdiction of the Department of the Interior or any bureau thereof, together with additional *public lands adjacent thereto*, within the Territory of Alaska, or any other public lands which are actually occupied by Indians or Eskimos within said Territory: *Provided*, That the designation by the Secretary of the Interior of *any such area of land* as a reservation shall

be effective only upon its approval by the vote, by secret ballot, of a majority of the Indian or Eskimo residents thereof who vote at a special election duly called by the Secretary of the Interior upon thirty days' notice: [Emphasis supplied.]

The 1884 Act, referred to, provides "that the Indians * * * shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them * * *." The 1891 Act reserved from sale any lands "to which the natives of Alaska have prior rights by virtue of actual occupation."

The natives of Karluk met all the statutory requirements. They had occupied and used the area in question since time immemorial, and forty acres within the 1943 reservation had been reserved on March 4, 1930, by Executive Order No. 5289, for their use for a school. The Indians approved establishment of the reservation as required by the 1936 statute (R. 462). Accordingly, the sole question raised with respect to Public Land Order No. 128 is whether the phrases "any area of land" and "public lands" in the 1936 Act empower the Secretary to include waters in the reservation as well as fast land. The petitioner submits that they do.

1. *The language of the 1936 Act embraced lands under water.*—The 1936 Act authorized the Secretary of the Interior to designate as an Indian

reservation "any area of land" reserved under the 1884 Act, the 1891 Act, or by executive order, together with additional "public lands" adjacent to such area of land or "any other public lands" actually occupied by Indians. Long before the enactment of the 1936 legislation, the "lands" reserved by the 1884 Act had been held to include lands under water. *Heckman v. Sutter*, 119 Fed. 83, 88 (C.C.A. 9), and 128 Fed. 393, 395 (C.C.A. 9); *Sutter v. Heckman*, 1 Alaska 188; *Miller v. United States*, 159 F. 2d 997 (C.C.A. 9). The "lands" reserved by Section 15 of the 1891 Act had been held to include waters as well as uplands (*Alaska Pacific Fisheries v. United States*, 248 U. S. 78), and many executive order reservations established in Alaska prior to 1936 had included underwater lands.³ Thus at every point the "lands" which the 1936 Act authorized the Secretary of the Interior to designate as Indian reservations have been held to include tidelands and fisheries. Plainly, Congress adopted this executive and

³ See, for example, Executive Order No. 2141, February 27, 1915 (Tyonek or Moquawkie Reserve), construed in 49 L. D. 592; Executive Order No. 6044, February 23, 1933 (Amaknak); Executive Order No. 1555, June 19, 1912 (Hydaburg); Proclamation No. 39, December 24, 1892, 27 Stat. 1052; Proclamation No. 1332, April 28, 1916, 39 Stat. 1777 (Annette Islands). The validity of the Annette Islands proclamation was upheld in *Alaska Pacific Fisheries v. United States*, 240 Fed. 274 (C.C.A. 9), affirmed on other grounds, 248 U. S. 78, and was recognized by Congress in the Act of May 7, 1934, c. 221, 48 Stat. 667, 8 U.S.C. 601 note. That these reservations included coastal waters is shown, in detail, *infra*, note 12, p. 40, and p. 48.

judicial construction in 1936 when it specifically referred to the earlier statutes and executive orders. *Stairs v. Peaslee*, 18 How. 521; *Johnson v. Manhattan Ry. Co.*, 289 U. S. 479; *Armstrong Paint & Varnish Co. v. Nu-Enamel Corp.*, 305 U. S. 315.

The court below (R. 507, 508), unlike the trial court (R. 57), accepted the view that the word "land" as used in the 1936 Act includes tide or submerged lands.⁴ It fell into its first error, however, when it divided the lands which might be reserved into four classes (R. 501-502) and stated that it was not contended that "these Indians had had reserved to them any of the below tide waters of Shelikof Strait by virtue of" the 1884 Act, the 1891 Act or executive order (the court's first two classes) and that hence the only possible source of authority for the Secretary would be the later language of the Act referring to "public lands" (R. 502). The court below apparently thought that the phrase "any area of land which

⁴The opinion of the circuit court of appeals refers throughout to land below low-water mark, and states (R. 499, note 1) that the injunction and present litigation are not concerned with rights between high and low water. The injunction relates to land below mean low tide (R. 41) but the complaint sought a decree that no reservation under the 1936 Act could "lawfully embrace tide lands or ocean waters" (R. 14), and the conclusions of law of the trial court stated (R. 39) that the order establishing the reservation was invalid "insofar as the same purports to cover or embrace the ocean or tidal waters below mean high tide." The theory of the court below that *Borax, Ltd. v. Los Angeles*, 296 U. S. 10, and similar decisions are controlling, would exclude tidelands, i.e., lands below high-water mark, from the reservation.

has been reserved" was inapplicable because no formal reservation had been established.

But neither the 1884 Act nor the 1891 Act required a formal reservation of particular areas. See *supra*, p. 15. They preserved the "prior rights" of Indians in all lands used, occupied, or claimed by them. They left formal reservation of such areas "for future legislation by Congress." As the Secretary of the Interior stated in urging passage of the bill which became the 1936 Act: "Lands which should have been, by virtue of these acts, segregated for natives of Alaska have not been so segregated. The provisions of section 2 of H. R. 9866 will aid the Federal Government in rectifying this condition, and in protecting the interests of the natives in the future." H. Rep. No. 2244, 74th Cong., 2d Sess., pp. 3-5; S. Rep. No. 1748, 74th Cong., 2d Sess. pp. 3-4. The 1936 Act supplied a procedure whereby specific boundaries of those areas would be fixed. The Karluk Indians had prior rights in the area here in question by virtue of use, occupation and claim since time immemorial, but the limits thereof had never been defined. Accordingly, the phrase "any area of land" used in the first part of the 1936 Act is applicable to the land involved here.

But even if the Karluk Indians had not been occupying the beach and adjacent area since time immemorial, and authority for this reservation rested solely on the provisions of the 1936 Act

referring to "public lands," the construction given to that phrase by the court below was erroneous. The phrase "public lands," when used in legislation relating to Alaska, has the same comprehensive meaning as the word "lands" alone. The adjective "public" in the context of Alaskan legislation simply means "not private." This clearly appears from an analysis of the Act of March 3, 1891, 26 Stat. 1095. Section 12 of that Act provides that persons "now or hereafter in possession of and occupying *public lands* in Alaska for the purpose of trade or manufactures" may secure patents to 160 acres, and Section 13 provides the machinery for that purpose. Section 14 then sets forth various exceptions to Sections 12 and 13 including lands occupied by Indians and concludes:

there shall be reserved in all patents issued under the provisions of the last two preceding sections the right of the United States to regulate the taking of salmon and to do all things necessary to protect and prevent the destruction of salmon in all the waters of the *lands* granted frequented by salmon [emphasis supplied].

This provision, and other exceptions in Section 14, show that "public lands" in Section 12 were not limited to uplands but included tidelands and lands under water. Again, when Congress, in the Act of July 3, 1926, 44 Stat. 821, 48 U.S.C. 360,

authorized the leasing of "public lands of the United States in the Territory of Alaska" for fur farming, it provided that leases or permits "shall reserve to the Secretary of the Interior the right to permit the use and occupation of parts of said leased areas for the taking, preparing, manufacturing, or storing of fish or fish products."

Similarly, the courts have construed the phrase "public domain" in legislation applicable to Alaska as including submerged lands. In *Alaska Gold Recov. Co. v. Northern M. & T. Co.*, 7 Alaska 386, 398, the court referred to submerged lands as part of the "public domain." And more recently in *Dow v. Ickes*, 123 F. 2d 909, 914 (App. D. C.), certiorari denied, 315 U. S. 807, the court, referring to the White Act regulatory authority which relates solely to fishing, stated: "The power given is appropriate for the regulation of activities upon the public domain, having as their object the reduction of public property to private use." Cf. 22 Op. A. G. 544.

The administrative understanding that "public lands" in Alaska included submerged lands is shown as early as December 24, 1892, by Proclamation No. 39, 27 Stat. 1652, under Section 24 of the 1891 Act authorizing reservation of "public lands," which set aside Afognak Island and lands within one mile from the shore thereof for fish culture purposes.

The decisions such as *Borax, Ltd. v. Los Angeles*,

296 U. S. 10, 17, relied upon by the court below, are not apposite here since they do not deal with public lands in Alaska. The Organic Act of May 17, 1884, 23 Stat. 24, provided that "the general land laws of the United States" should not apply to Alaska, and that "Indians and other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them" (Sec. 8). In addition, the decisions such as that in the *Borax* case all relate to statutes providing for disposal of property of the United States. The 1936 Act did not authorize disposal but merely a reservation of the lands for a particular governmental use, that is, protection and assistance for the Indians. This Court emphasized the importance of that distinction in *Alaska Pacific Fisheries v. United States*, 248 U. S. 78, 88, saying:

The reservation was not in the nature of a private grant, but simply a setting apart, "until otherwise provided by law," of designated public property for a recognized public purpose—that of safeguarding and advancing a dependent Indian people dwelling within the United States.

The distinction between a grant of public lands and a reservation is further illustrated in *Sioux Tribe v. United States*, 316 U. S. 317, holding that the President, without express statutory authority, could properly reserve portions of the public

domain for the use of the Indians, but he could not thereby grant vested rights to the Indians so as to give them a right to compensation when the lands were later sold. See also *Ute Indians v. United States*, 330 U. S. 169.

The court below thought that the decision in *United States v. Holt Bank*, 270 U. S. 49, shows that there is no distinction between the construction to be given a disposal act and a reservation act. But the reservation act involved in the *Holt Bank* case, being a treaty reservation, was more like a disposal than an executive reservation. Unlike the reservation here involved, that created in the *Holt Bank* case gave a compensable interest to the Indians, not merely a temporary revocable right to use and occupy public lands. See *Sioux Tribe v. United States*, and *Ute Indians v. United States*, *supra*.

Finally, it must be remembered that while ambiguities in grants by the Federal Government are resolved in favor of the United States (*Northern Pacific R. Co. v. United States*, 330 U. S. 248, 257), doubtful expressions in Indian treaties and statutes are resolved in favor of the Indians. *Alaska Pacific Fisheries v. United States*, 248 U. S. 78, 89.

Thus, undoubtedly because of the importance of waters to the Alaskan economy and because the general land laws have not been applied there, Congress, the executive officials and the courts

have used the terms "lands," "public lands" and "public domain" interchangeably in referring to submerged land owned by the Government in Alaska. It was quite natural that the Organic Act of 1884 should refer simply to "lands" since private titles in Alaska had not then been confirmed, but that thereafter Congress should refer to "public lands" so as to exclude tracts where private titles had been obtained. That the word "public" was used for this reason in the 1936 Act and not, as the court below thought, to narrow the scope of lands which might be added to reservations, is borne out by the fact that the proviso following the disputed language refers to all four classes as "such lands." See *supra*, p. 14.

2. *The purpose of Congress to authorize the reservation of tide and submerged lands is evidenced by the circumstances under which the Act of May 1, 1936, was adopted, and by its legislative history.*—The proper approach to the problem of whether an Indian reservation includes coastal waters as well as uplands was outlined by this Court in *Alaska Pacific Fisheries v. United States*, 248 U. S. 78, 87, as follows:

As an appreciation of the circumstances in which words are used usually is conducive and at times is essential to a right understanding of them, it is important, in approaching a solution of the question stated, to have in mind the circumstances in which the reserva-

Act, the Secretary of Commerce should not discriminate among individuals. There is nothing in the Act curtailing the power of other Government officials to set aside federally owned property in Alaska for particular public purposes. It is not to be assumed, for example, absent a specific prohibition, that the proviso deprived the President of his authority to make such reservations of the public domain as the interests of the United States might require (Cf. *United States v. Midwest Oil Co.*, 236 U. S. 459), nor that it prohibited inclusion of waters in a military or naval reservation (R. 294) or fishing therein by the Government exclusively for military purposes. Clearly, the Act was not intended to affect the powers and duties of the Secretary of the Interior with respect to Indians.¹⁰

Moreover, the creation of an Indian reservation is a reservation of lands for governmental use. The full purpose of federal guardianship of Indians is that they receive special protection not granted to other citizens until such time as they may be assimilated into the general population. In view of the history and physical facts of Alaska, a *sine qua non* of such protection is to preserve rights of fishing to the natives. The United States was not named in the Act. Therefore the Act cannot limit the authority of the

¹⁰ The transfer of fishing control from the Secretary of Commerce to the Secretary of the Interior did not diminish those powers (R. 503). It did not enlarge the scope or meaning of the White Act.

United States existing under other statutes to reserve under-water lands for its own uses. *United States v. Wyoming*, 331 U. S. 440; *United States v. United Mine Workers of America*, 330 U. S. 258.

2. *The legislative history of the White Act affirmatively shows that Indian fisheries are not subject to the antimonopoly provision.*—Prior to 1924, the Secretary of Commerce had asserted the power to establish fishery reservations in which he might grant to selected individuals rights withheld from others. This power, which had been challenged on grounds of law and policy¹¹ was confirmed in part and curtailed in part in the White Act. It was confirmed insofar as the Secretary was expressly authorized to “reserve fishing areas” for regulatory purposes. It was curtailed in that the Secretary was prohibited from granting fishing privileges to some and denying them to others in the same area. As the Senator in charge of the bill said: “The bill removes the principal cause of complaint with reference to the exercise of power by the Secretary of Commerce * * *.” 65 Cong. Rec. pt. 9, pp. 9520-9521 (May 26, 1924); see also 65 Cong. Rec. pt. 10, pp. 9681, 9682; accord: H. Rep. 357, 68th Cong., 1st Sess., p. 2; S. Rep. 449, 68th Cong., 1st Sess., p. 5.

¹¹ Hearings, H. Committee on Merchant Marine and Fisheries, H.R. 2714, 68th Cong., 1st Sess. (1924), pp. 9-11, 19, 25-28, 83, 272-273.

At the time the Act was passed there were eighty or more Indian settlements in Alaska most of which bordered on tidal waters (R. 502). There had been dispute earlier as to whether such tidal waters could be a proper part of an Indian reservation. That dispute had been finally determined by this Court in *Alaska Pacific Fisheries v. United States*, 248 U. S. 78. Thus, at various reservations, such as the Tyonek or Moquawkie Reservation, exclusive control over adjacent waters was asserted by the Federal Government on behalf of the natives. See 49 L. D. 592. Certainly the White Act is not to be construed as abolishing these native fishery reserves.¹²

Nowhere does the legislative history show any protest against the Annette Island Reserve, the Tyonek Reserve, or any other native reserve. On the contrary, the whole legislative history of the Act shows that an essential part of the guiding spirit and motive for the legislation was the pro-

¹² Respondents assert (Br. in Opp. 14-15, 23) that except for the Annette Island reserve "no Indian or Eskimo reservation in Alaska has accorded any exclusive or special right of commercial fishing". The assertion (Br. in Opp. 15 fn. 4) that the Tyonek reservation involved a "land area only" overlooks the fact that the boundaries ran "to the middle of the main current of the Chuit River, eight miles more or less; thence with the main channel of said stream to where it discharges into Cook Inlet" (Ex. Order No. 2141). In 49 L. D. 592 it was concluded that a lease might be made on this reservation of cannery and fishing privileges so as to increase the income of the natives from fishing. And, the Hydaburg Reservation included "land and water surfaces" of Sukkwan Strait the plat attached thereto showing that considerable water area was involved (Ex. Order No. 1555).

As early as 1795, the Karluk natives are reported to have engaged in commercial fishing transactions with the Russians. Bancroft, H. H., *History of Alaska*, 1730-1885, pp. 230, 357. One of the best statements of the importance of such commercial fishing was made by Alaskan Delegate Sutherland who, quoting an Indian leader, stated (72 Cong. Rec. pt. 2, p. 1202 (1930)):

There are no people who have a greater right to demand of Congress that its rights be protected than the natives of Alaska. We live on fish and have lived on fish as our principal source of food for centuries. Today we still live on fish; we buy our clothing with fish, support our families with fish, educate our children with fish, and bury our dead from that source.⁶

To these Indians the fishing fields are the harvest fields. As the Commissioner of Indian Affairs stated of the Kodiak Island natives generally in his Report to the Secretary of the Interior in 1875 (p. 203): " * * * but not having either walrus, whales, or large seals, they live more on salmon, whitefish, and other fresh water fish which they catch in ingenious traps, and dry for winter use."

For several years prior to 1936, Congress was repeatedly advised of the importance of fishing

⁶ See also 72 Cong. Rec. pt. 3, p. 2408; 75 Cong. Rec. pt. 1, p. 60; Senate Joint Memorial 1, 77 Cong. Rec. pt. 1, pp. 1056-1069; Hearings, H. Committee on Indian Affairs, H.R. 7902, 73d Cong., 2d Sess. pp. 76, 498; and *Moore v. United States*, 157 F. 2d 760, 762 (C.C.A. 9), certiorari denied, 330 U. S. 827.

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tection of Alaskan natives and other Alaskan residents against the monopoly of Alaskan fishery resources by absentee corporations.

"There is an obligation to the native Alaskan Indian, which conscience demands us to fulfil," said President Harding on July 27, 1923, at Seattle after his return from Alaska, in his last public address, which called for the enactment of legislation along the lines of the White Act. "If Congress cannot agree upon a program of helpful legislation," he declared, "the reservations and their regulations will be further extended by Executive order."¹³ In this recognition of the obligation to respect native fishing rights, President Harding was following the words of the Annual Report of the Governor of Alaska in 1922:¹⁴

The problems of the fisheries are general, not local, except in respect of the guaranteed rights of the natives which must be respected and upheld.

In this same connection, Secretary of Commerce Hoover expressed his concern over the fact that commercial fishing in some areas was so exhaustive as to bring about "actual starvation among Indians and work dogs."¹⁵

The hearings before the House Committee on

¹³ Alaskan Territorial Fish Commission, *Conservation of the Fisheries of Alaska*, August 1923.

¹⁴ *Ibid.*

¹⁵ *Ibid.*

to the Alaskan Indians. In 1930, Alaska Delegate Sutherland stated (72 Cong. Rec., pt. 2, pp. 1200, 1201:

The poverty, distress, and destitution of the Alaska natives can be attributed only to the selfishness and greed of our absentee landlords and the spinelessness and duplicity of our Department of Commerce. * * * People who do not know Alaska and its native races cannot comprehend what the salmon fisheries mean to its people. The salmon fishery is their last stand in the industries to which they are naturally adapted.

He specifically called the attention of Congress to the great need for protecting the rights of the Karluk Indians in the fishing grounds of their forefathers. Complaining of the inequities of the then existing regulations, he stated that at Karluk, where commercial operators were taking two and a half million pounds of fish "at one heave of the seine," the Indians were hardly permitted to fish. 72 Cong. Rec. pt. 3, p. 2408 (1930).

Memorials from the Territorial Legislature were presented to Congress to show how important the fisheries were to the natives of Alaska and the difficulties they were facing in pursuing their usual occupations. One such memorial, presented by Delegate Wickersham on December 8, 1931, stated:⁷

⁷ 75 Cong. Rec. pt. 1, p. 60 (1931); see also Senate Joint Memorial 1, 77 Cong. Rec. pt. 1, p. 1069 (1933).

* * * the white man took the best of their fishing grounds and trapping rights, until, with but a few exceptions, the 30,000 Indians of the Territory of Alaska find difficulty in providing themselves with the necessities of life, with the result that, and because of their peaceable dispositions and lives, the United States Government has taken but little interest in the aboriginal population of Alaska, has not provided adequate reservations for their use * * *.

Delegate Dimond stated on March 30, 1933, the sixty-sixth anniversary of the inclusion of Alaska as a part of the United States:*

If the Indian is to make a living, it must be in the fishing industry. The majority of them earn their bread and butter in this industry. There is no other possible avenue open to them.

The importance of fishing to the Alaska Indians and their need for protection was again emphasized when the Wheeler-Howard Act of June 18, 1934, 48 Stat. 984, was being considered by Congress. The delegate from Alaska, Mr. Dimond, testifying before the Indian Affairs Committee, in response to a question whether the land purchase provisions of the bill should apply to Alaska Indians, declared:

In a few rare cases it would. Of course, the agricultural lands occupied by the Indians, occupied by the Alaska Indians, are very small.

* 77 Cong. Rec. pt. 1, p. 1056.

They particularly prefer land along the coast with fishing rights.

Hearings, H. Committee on Indian Affairs, H. R. 7902, 73d Cong., 2d Sess. (1934), p. 76; see *id.*, p. 498.

Most of the provisions of the Wheeler-Howard Act were not made applicable to Alaska at the time, in part because the natives were not sure how it would affect them. Cohen, *Handbook of Indian Law*, p. 415. However, in the 1936 Act the land purchase sections and other provisions relating to lands were extended to Alaska. The Secretary of the Interior, in urging passage of the bill which became the 1936 Act, discussed the utility of precise reservation boundaries for purposes of local government, and stated (H. Rep. No. 2244, 74th Cong., 2d Sess., pp. 3-5; S. Rep. No. 1748, 74th Cong., 2d Sess. pp. 3-4):

An even more important reason for the designation of reservations in Alaska is that by doing so the United States Government will have fulfilled in part its moral and legal obligations *in the protection of the economic rights of the Alaska natives*. In at least two acts of Congress this obligation is specifically acknowledged. The act approved on May 17, 1884 (23 Stat. 26), contains the following language: "*Provided, That the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them but the*

terms under which such persons may acquire title to such lands is reserved for future legislation by Congress."

The act of March 3, 1891 (26 Stat. 1100), contains similar language * * *. Lands which should have been, by virtue of these acts, segregated for natives of Alaska have not been so segregated. The provisions of section 2 of H. R. 9866 will aid the Federal Government in rectifying this condition, and in protecting the interests of the natives in the future. Section 2 of the bill which gives to the Secretary of the Interior power to designate certain lands as Indian reservations is, therefore, a logical sequence of the legislative history regarding Indian lands in Alaska and provides a method by which the financial aid provisions of the Indian Reorganization Act may be extended to those Indians and Eskimos of Alaska who occupy established villages.

The bill provides that reservations shall be set up by the Secretary of the Interior only upon approval of the majority of the residents of such proposed reservation who vote at a special election. This stipulation is in line with the policy of permitting Indians to participate in deciding matters of importance to them. [Emphasis supplied.]

It is clear from the foregoing history that Congress fully understood that the fisheries along the coast and not land cultivation or other enterprise was the basis of the economic life of the Alaskan Indians. It is also clear that in the

1936 Act, Congress was legislating to protect the "economic rights of the Alaska natives" and to fulfill the promises of the 1884 and 1891 Acts. It must be presumed, also, that Congress knew that those earlier enactments had been construed to embrace submerged coastal lands. See *supra*, p. 16.

A reservation limited to barren uplands in Alaska would be of very little benefit to these natives. Nor is there basis for the suggestion of the court below (R. 511), that use of the uplands for launching boats and for posts to which to attach nets would constitute adequate protection of the economic rights of the Indians. The Indians on the Annette Island Reservation could have launched boats from, and attached posts to, their uplands. There, as here, "Salmon and other fish in large numbers frequent and pass through the waters adjacent to the shore", *Alaska-Pacific Fisheries v. United States*, 248 U. S. 78, 88. But this Court held that the uplands did not meet "the situation and needs of the Indians and the object to be attained" (p. 87).

The respondents refer to the 1936 Act as a "seemingly innocuous and undiscussed minor amendment to the Wheeler-Howard Act", not to be construed as giving "the Secretary of the Interior a power of life and death over the Alaska salmon industry" (Br. in Opp., p. 21). Limited, as is the 1936 Act, to areas previously reserved for,

warrant a stretching of the proviso in the White Act so as to make of it an implied repealer of existing and future native fishery reserves established under independent statutory authority.

3. *Administrative interpretation of the White Act from 1924 to date has excluded Indian fisheries from the antimonopoly provision.*—The conclusion that the White Act was not intended to wipe out native reserves is fortified by the administrative interpretation of the Act. On June 7, 1924, the day after approval of the White Act, the President "revoked the Executive Orders of February 17, 1922, and November 3, 1922, creating the Alaska Peninsula Fisheries Reservation and the Southwestern Alaska Fisheries Reservation, respectively." These were the two large commercial fishery reservations against which all the attacks in the hearings and debates on the White Act had been directed. But the President and the Secretary of Commerce did not revoke any native reserves. On the contrary, the regulations particularly called attention to the continued existence and validity of these native reserves, mentioning expressly those re-

Senator Walgren proposed an amendment to this provision which would substitute the language of the White Act "equality proviso," *Ibid.* p. 13. Delegate Dimond of Alaska likewise objected "as strongly as I can" to the original provision, quoted above, *Ibid.* p. 32. The Department of the Interior joined with the Delegate from Alaska in objecting to the measure which, though favorably reported, was never passed by either House. The action of Congress was therefore in accord with the position of the Delegate from Alaska and the Department of the Interior.

or occupied by, the Indians, and lands adjacent thereto," the power granted is hardly one which would permit of the destruction of the entire salmon industry. It is, rather, a power designed to prevent continued disregard of the rights of Indians, granted by a Congress, not in passing and without deliberation, but in response to the representations of such interested parties as "the largest organized body of Indians in Alaska, known as the Alaska Native Brotherhood, and embracing over 5,000 of the native citizens of Alaska", who, the House Committee noted in its report, "at their own expense sent their secretary, Mr. William L. Paul, an attorney at law and a member of the Tlingit Tribe to Washington to appear before the committee in support of the bill and the proposed amendments hereinabove set out," H. Rep. No. 2244, 74th Cong., 2d Sess., p. 3.

The court below seems to have been greatly influenced by the size of respondents, the amount of their investment and the number of employees as compared with the number of Karluk Indians, their resources, etc. (R. 503, 505-506, 511). But Congress in the 1936 Act established the policy⁹ of protecting the Indians' fishing grounds from usurpation by the salmon industry. Thus, those policy considerations were not properly a matter

⁹ The Solicitor of the Interior Department, in his opinion construing the 1936 Act, ruled that waters not connected with any reservation of uplands could not be reserved for Indians. 56 I.D. 110.

for consideration by the court below. Moreover, the opinion below indicates a misapprehension as to many of the material facts in this regard. For example, reference is made to exclusion of the packing companies "from their established fishing grounds" (R. 512). But it was the Indian who had fished at Karluk from time immemorial. Respondents were newcomers to that area. While, as the findings state, respondents have had canneries on Kodiak Island for from 7 to 24 years (R. 27-28), they have fished the Karluk area only since about 1938, purse seining having been forbidden for many years prior thereto (R. 352-355, 361-363). Thus, while the Kodiak Fisheries Company had operated on the island for 34 years, its fishermen first operated in the Karluk area in 1938 (R. 142; see also R. 159, 285, 172, 216, 291). And the Parks Canning Company started in the Karluk area in 1940 (R. 207). Again, the court below stated that there was no evidence that the catch of the white fishermen in any way lessened the catch of the Indians (R. 505), a passage which respondents quote (Br. in Opp. 23). On the contrary, the natives testified that respondents' operations interfered with the native beach seine (R. 352, 360) and that if the boats had kept out of the area the natives could have caught more fish (R. 361). Similarly, the court emphasized the large area of upland included in the reservation (R. 505) but ignored the evidence that "all

the Karluk natives live by fishing only" (R. 348). Thus, the Karluk area presents a typical example of the situation in which the 1936 Act was intended to give the Alaska Indians protection against the intrusion of the large companies upon the historic Indian fishing sites when the catch of those companies in other areas declined (R. 291, 293-294).

3. *The administrative construction of the 1936 Act supports the view that it embraced submerged coastal lands.*—Shortly after the 1936 act became law, the question here presented was submitted to the Solicitor of the Interior Department. On April 19, 1937, an opinion was given which, after referring to the authorities on the subject, concluded that submerged coastal lands could be reserved for use of the Indians. The Solicitor said (56 I.D. 110, 113):

The act recites the title of the Indian Reorganization Act (48 Stat. 984), June 18, 1934, which states as its purposes "to conserve and develop Indian lands and resources; to extend to Indians the right to form business and other organizations; to establish a credit system for Indians * * *." It is well known, as is recited in the opinions of the Supreme Court and the Circuit Court of Appeals concerning the Metlakatla Indians, that the natives of Alaska are not naturally agricultural and depend chiefly on fishing and hunting for their livelihood. The fish of the Alaska coast region is one of their major resources and therefore ap-

appropriate to be conserved under the Reorganization Act in connection with their reservations. Moreover, a large number of the organizations developed under the Reorganization Act, particularly in southeast Alaska, will be fisheries and fish canneries. It will be these fish enterprises, similar to the successful enterprise developed by the Indians of the Annette Islands, which will be major users of the credit system established under the Reorganization Act. The Alaska Reorganization Act provides that the Indians may be organized, not as bands or tribes, but as groups having "a common bond of occupation." One of the most usual bonds of occupation is that of fishing and it is certain that many of the communities organized under the Reorganization Act will be fishing communities. The economic purpose of this legislation extending the Reorganization Act to Alaska was made clear in the report by the Interior Department to Congress on this act when it was introduced. The report stated that since the original Indian Reorganization Act did not extend the right of incorporation and enjoyment of credit privileges to Alaska, the Alaska Act was designed to remedy this omission. From these facts it is evident that the purpose of the Alaska Act would be seriously frustrated if the reservations designated under it could not embrace the major resource of many of the Indian organizations.

his administrative interpretation has been fol-

lowed consistently not only in later opinions (57 I.D. 461), but also by the action of the administrative officers establishing other reservations, as well as that for the Village of Karluk. Order of May 20, 1943, 8 F.R. 7731 (Akutan); Order of June 19, 1943, 8 F.R. 9464 (Wales); Order of April 22, 1946, 11 F.R. 6143 (Little Diomedé). Thus, for a period of 10 years since the passage of the 1936 Act, the administrative officials have uniformly construed the statute to authorize the reservation of under-water lands and the instant case represents the first time that such interpretation has been challenged. The rule is settled that the construction given to a statute by the authorities charged with its administration is entitled to great weight. This is especially true when statutes relating to public lands of the United States are involved. *McLaren v. Fleischer*, 256 U. S. 477, 481; cf. *United States v. Wyoming*, 331 U. S. 440. And this Court applied the rule in the similar case of *Alaska Pacific Fisheries v. United States*, 248 U. S. 78, 90.

B. The White Act of June 6, 1924, does not prohibit the Secretary of the Interior from including coastal waters in an Indian reservation created under the Act of May 1, 1936.

The Act of June 6, 1924, 43 Stat. 464, as amended June 18, 1926, 44 Stat. 752, 48 U.S.C. 221-228, commonly referred to as the White Act, provides that, for purposes of conservation, "the Secretary of Commerce from time to time may set apart and reserve fishing areas in any of the waters of Alaska

over which the United States has jurisdiction, and within such areas may establish closed seasons during which fishing may be limited or prohibited as he may prescribe." In addition, the Act contains the following proviso:

Provided, That every such regulation made by the Secretary of Commerce shall be of general application within the particular area to which it applies, and that no exclusive or several right of fishery shall be granted therein, nor shall any citizen of the United States be denied the right to take, prepare, cure, or preserve fish or shellfish in any area of the waters of Alaska where fishing is permitted by the Secretary of Commerce.

The district court held and the circuit court of appeals seems to have concurred in the view that this "anti-monopoly" provision of the 1924 White Act prohibits the Secretary of the Interior from including fishing waters in an Indian reservation established under the 1936 Act (R. 54-59, 502-506). Petitioner submits that the courts below erred in that respect.

1. *The White Act proviso did not purport to limit the authority to set aside public property for federal uses.*—It was the view of the courts below that the White Act limited any action taken with respect to lands under water in Alaska. But the Act does not so provide. It simply directed that in making the fishing regulations authorized by the

of such sites. Neither conclusion follows from the premise. As has been said, the first would merely make appellant a beneficiary of the allegedly illegal system. That the second might provide a method which, if adopted by the Secretary, would avoid the alleged violation of the statutory limitation, does not establish the appellant's right to require him to adopt it or have the courts order him to do so. To do that it would be necessary to show not only that this method would avoid the allegedly illegal discrimination, but that it is the only one which would do so. Appellant has not shown this. The Secretary might prefer some other method or to close Alaskan waters entirely to fishing for salmon by trap. It follows that the affirmative relief which appellant seeks, whether by way of an order directing the approval of specific sites or one directing the opening of new general areas to fishing for salmon by trap, cannot be granted.

In the present case there are many ways whereby the Secretary could avoid the alleged illegality without giving the respondents the right to fish in these waters. He could continue the prohibition in force within the disputed area and drop the exemption. He could, as he has done in the past, forbid all fishing by purse seine boats in the area,²³ which

²³ Purse seining for salmon off the Karluk beach was prohibited from 1924 to 1934. See Department of Commerce, *Laws and Regulations for Protection of Fisheries of Alaska*, Department Circular No. 251, 10th ed. (June 21, 1924), p. 7; 12th ed. (December 5, 1925), p. 12; 13th ed. (December 22,

would eliminate all the operations of the respondents, and permit continued operation of the beach seines used by the natives. Or he could stop all seining operations and allow the installation of traps only by the native landowners. The respondents have not shown and cannot show not only that the relief they seek "would avoid the allegedly illegal discrimination, but that it is the only one which would do so." The action which must appropriately follow upon a declaration of invalidity of Regulation 208.23(r) is action of the Secretary. That being so, he should have been made a party to this suit.

Finally, the only defendant in this case is Frank Hynes, Regional Director of the Fish and Wildlife Service of the Department of the Interior. As respondents' counsel recognized (R. 120), Hynes has no connection with, or duties in regard to, Indian affairs. Plainly, the presence of Hynes as a defendant could not give the courts below jurisdiction to pass on the validity of the Secretary's creation of the Indian reservation.

(1926), p. 13; 16th ed. (December 19, 1929), p. 14; 17th ed. (December 18, 1930), p. 15; 18th ed. (December 17, 1931), p. 16; 19th ed. (December 20, 1932), p. 18; 20th ed. (December 21, 1933), p. 17; the prohibition was lifted by supplementary circular No. 251-20-3 (June 4, 1934). The waters were again closed to purse seining by amendment to sec. 208.18 of the Alaska Commercial Fisheries Regulations of August 27, 1946 (11 F. R. 9528), which was rescinded on January 20, 1947 (12 F. R. 536).

Merchant Marine and Fisheries (Hearings, H. Committee on Merchant Marine and Fisheries, H. R. 2714, 68th Cong., 1st Sess. (1924)) which led to the enactment of the White Act shows that the protests against fishery reservations were directed against the two reservations covering 40 percent of the fishing waters of Alaska (not to Indian reservations like Annette Island, Hyda-burg and Tyonek) set up by the Secretary of Commerce in 1922 under which certain companies were allowed fishing rights that were denied to others. The natives themselves were among the foremost sponsors of the White Act, as indicated by communications from the Alaska Native Brotherhood, and from the native communities of Kake, Hoonah, Juneau, and Yakutat. All other witnesses who referred to the natives expressed sympathy and concern for their plight. The charge that the Department of Commerce unjustly denied natives fishing rights was stressed by the Delegate from Alaska. The Solicitor of the Department of Commerce and the attorney for the packers agreed as to the validity of the Annette Island Reservation and made no criticism of it; they cited the decisions of this Court as giving a final and complete clarification of the law. Andrew Furuseth, witness for the International Seaman's Union, declared: "We are destroying the food supply of the Indians and their

villages are decreasing while their graveyards are getting larger in size."

The equality proviso which was designed to stop the process whereby the Secretary of Commerce had granted special privileges to favored companies is originally found in H. R. 4826, 68th Cong., 1st sess. (1924) introduced by the Delegate from Alaska. In its original form this proviso read as follows:

Provided, That no exclusive or several right of fishery shall be granted, permitted, or recognized in the Territorial waters of Alaska by the Secretary of Commerce, the Alaska Territorial Legislature, the Alaska Fish Commission, or any other constituted authority except the United States Congress: *Provided further*, That this provision shall not affect any right exercised by the descendants of the aboriginal people of Alaska or those of the half blood who are descendants of the aborigines which were exercised and claimed up to the passage of this act.

As originally formulated, the first of those provisos, applying in terms not only to the Secretary of Commerce but also to "any other constituted authority except the United States Congress" (including, of course, the Secretary of the Interior), might well have been construed as an extinguishment or prohibition of native fishing rights; therefore the second proviso was added to eliminate the possibility of any such construction.

When later the first proviso was reduced to a limitation upon the permissive powers of the Secretary of Commerce alone, the second proviso was no longer necessary and was dropped. The reports of the House and Senate Committees credited the delegate from Alaska as the author of the proviso prohibiting the Secretary of Commerce from granting special privileges. They explained the proviso and its purpose in the following terms:¹⁶

The section further deals directly with a practice heretofore followed with respect to granting fish permits. At the present time it is the policy of the department as one means of control of fishing to grant a limited number of fishing permits within any designated area and to exclude all others from fishing rights therein. Your committee does not question the purpose of the department in this regard, but it has reached the unanimous and positive opinion that this practice of granting exclusive fishing privileges should cease and in this section it is declared that all regulations authorized to be made shall be of general application and that no exclusive or several right of fisheries shall be granted, nor shall any citizen be denied the right to take fish in water where fishing is permitted. This declaration of policy and prohibition of law was earnestly urged upon the committee by the Delegate

¹⁶ S. Rep. 449, 68th Cong., 1st Sess., p. 5; citing H. Rep. 357, 68th Cong., 1st Sess., p. 2. It is clear that Delegate Sutherland was agreeable to the amended language. See 65 Cong. Rec., pt. 9, p. 9520 (1924).

from the Territory, Mr. Sutherland, and has the general support of the people of the Territory.

It would be ironic in the extreme if the "equality" proviso which the Alaskan natives urged in 1924 and which Delegate Sutherland persuaded Congress to include in the White Act should be used, after twenty years, not to wipe out exclusive rights in fish trap sites, which Delegate Sutherland denounced, but rather to wipe out the last toehold that Alaskan native communities have on the few fisheries that remain to them.

The legislative debates indicate clear recognition of the need for protecting the economic position of the Alaskan native,¹⁷ and at least one proposed amendment was rejected on the ground of probable injury to Indians.¹⁸ There is nothing to

¹⁷ See e.g. 65 Cong. Rec. pt. 10, p. 9688 (1924).

¹⁸ 65 Cong. Rec. pt. 6, pp. 5973-5975 (1924). Subsequently, in 1944, the subject was mentioned in connection with a bill that was never passed. In the court below, respondents relied upon the report of the Senate Commerce Committee which rejected a request of the Department of the Interior to add to the equality provision the language "subject to the provisions of . . . the Act of May 1, 1936 (49 Stat. 1250, c. 254) and other applicable laws" (S. Rep. No. 733, 78th Cong., 2d Sess., p. 6). The Committee Report was not based on the view that the Indians had no right of fisheries but the amendment was rejected because that Committee did not deem it appropriate "to deal with Indian questions in the present bill which relates to the conservation of the Alaskan fisheries" (S. Rep. No. 733, 78th Cong., 2d Sess., p. 6). As originally introduced, the bill provided that the fisheries of Alaska "shall be open to all citizens of the United States free of all exclusive or several rights under any claim of occupancy, aboriginal or otherwise." Hearings on S. 930, Sen. Com. on Commerce, 78th Cong., 2d sess. (1944) p. 1.

serves (Annette Island, Aleutian Islands, Afognak and Yes Bay) that in terms reserved fishing areas for native use.¹⁹ From the very outset, the regulations promulgated by the Secretary of Commerce made specific reference to the fact that within such reservations as the Annette Island Reserve fishing could be carried on only subject to the regulations governing native reservations prescribed by the Department of the Interior.²⁰

¹⁹ Department of Commerce, *Laws and Regulations for Protection of Fisheries of Alaska* (Dept. Circular No. 251, 10th ed.) June 21, 1924, pp. 5-6.

²⁰ The first Alaska fishing regulations following approval of the White Act on June 6, 1924, dated June 21, 1924, set apart as fishery reserves practically all of the waters of Alaska south of Bristol Bay, thus including four reservations in which Indians had special rights, the Annette Island Reservation, the Aleutian Island Reservation, set up by Executive Order of March 3, 1913, the Afognak Reservation and the Yes Bay Reservation. The last-named of these consisted of land and water "set apart as a site for a salmon hatchery, subject to the possessory rights of the natives and of persons claiming title through the Russian Government, also subject to the rights of natives to take fish from the waters and fuel from the forests included in the limits of the reservation." As to the Afognak Reservation, the White Act regulations were expressly declared inapplicable. The remaining three came within the areas reserved under the White Act. The attention of all fishermen was called to the prohibitions against non-native fishing in all four of these areas.

The regulations issued on December 5, 1925 (Department Circular No. 251, 12th ed.), followed the same pattern, as did the regulations dated December 22, 1926 (Department Circular No. 251, 13th ed.); and, except for the omission of references to the Afognak Reservation, similar provisions are found in the regulations promulgated on December 19, 1929 (Department Circular No. 251, 16th ed.). In later years, references to the "Yes Bay Reservation" were dropped, but express reference to the Annette Island and Aleutian Reservations has continued year by year down to and in-

The Department of the Interior concurred in this view and continued, from time to time, after 1924, to establish reservations of land and water for the use of native Alaskan fishing villages. One of the last public acts of President Hoover, who, as Secretary of Commerce, had been largely responsible for the formulation, enactment, and approval of the White Act,²¹ was to establish a native fishery reserve at Amaknak Island (Executive Order No. 6044, dated February 23, 1933). This order carries the title: "Withdrawal of Lands to Protect Fishing Rights of Alaska Natives" and the description of the lands withdrawn, one boundary of which ran "across Ilfuliuk Bay", shows that under water lands were included. It could hardly be thought that President Hoover, in issuing this executive order, was going counter to the purpose of the White Act.

This was the situation when the Department of the Interior entered upon a program of establishing reserves under the Act of May 1, 1936, 49 Stat. 1250, at the request of various native communities, which included ocean waters expressly or by impli-

cluding the current regulations. (See 1948 Regulations, pp. 13, 59.)

Since 1942, the regulations issued under the White Act have further expressly prohibited the establishment of fish traps in Indian reservation waters unless the Indians concerned agree thereto (Regulation 201.21b).

²¹ See S. Rep. 449, 68th Cong., 1st sess., pp. 2-4; 65 Cong. Rec. pt. 10, p. 9701 (1924); Hearings, H. Committee on Merchant Marine and Fisheries, H. R. 2714, 68th Cong., 1st sess. (1924), p. 1.

eration, wherever such waters were necessary for the local economy. At the outset, this practice was carefully considered and upheld in a Solicitor's opinion on April 19, 1937 (56 I.D. 110), and thereafter, as we have shown *supra*, p. 36, many reservations were established on the basis of that view of the statute.

4. *The White Act of 1924 is superseded by the 1936 Act to the extent of any inconsistency.*—

Respondents attempt to construe the White Act "equality" proviso as if it had said "no exclusive right of fishing may be reserved to any Indian under any statute enacted or to be enacted." As we have shown, such construction is not permissible in view of the language of the Act, its legislative history and its administrative construction. In addition, we have shown that the 1936 Act plainly authorized the inclusion of underwater lands in an Indian Reservation so as to reserve for the Indian an exclusive right of fishery. Thus, acceptance of respondents' construction of the White Act would produce an inconsistency between the two statutes.

But, even if such a view were accepted, the earlier act is superseded by the later act to the extent of any inconsistency. This means that the parts of the White Act providing for restrictions and prohibitions relating to gear, season, and take, as well as the enforcement provisions of the act, continue in force. The only part of the White Act that would fall, if the argument of incompatibility is accepted,

is the "equality" provision. This would substantiate the validity of the 1936 Act, the Karluk Reservation, and the use of other provisions of the White Act, unrestrained by the "equality" provision, to regulate fishing on the Karluk Native Reserve and to enforce regulations.

We submit, therefore, that the decisions of the courts below to the effect that the White Act prohibits inclusion in the Karluk Reservation of underwater lands is founded on the proposition that the Alaskan Indians are in the same position as other citizens. Since this proposition is contrary to the fact—recognized by Congress at the time of the passage of both the White Act and the 1936 Act—that the Indians have special interests in their historic fishing grounds and that protection of such interests is a proper function of the Federal Government, the holdings of the courts below were clearly erroneous.

II

THE SECRETARY OF THE INTERIOR WAS AN INDISPENSABLE PARTY TO THIS SUIT

We have shown in Point I that the Secretary of the Interior was clearly authorized by Congress to set aside the disputed area as an Indian reservation. The decision below was, we submit, erroneous for the additional reason that the issues raised were not properly before the Court.

Pursuant to the authority contained in the White

Act, the Secretary of the Interior on March 22, 1946, amended the Alaska Fisheries Regulations by adding a regulation which closed to fishing for salmon "all waters within 3,000 feet of the shores of Karluk Reservation" except "to fishing by natives in possession of said reservation [and] to fishing by other persons under authority granted by said natives." Section 208.23(r), 11 F. R. 3103.²² The result of the action was to make applicable the provision of the White Act punishing unlawful fishing by imposition of criminal penalties and by seizure of fish taken and of the boat, gear, and equipment used in such unlawful fishing. The trial court permanently enjoined enforcement of these provisions in the Karluk Reservation (R. 40-42). The circuit court of appeals upheld the injunction (R. 512). In so doing, the court below held, however, that the Secretary of the Interior was not an indispensable party to this suit because he "was without any authority whatsoever" to reserve coastal waters for the Indians under the 1936 Act and to regulate fisheries under the White Act by excluding some fishermen but not all (R. 512-513). As basis for that ruling the court relied on *Neher v. Harwood*, 128 F. 2d 846 (C. C. A. 9); *Colorado v. Toll*, 268 U. S. 228, and similar cases (R. 513-514). Subsequently, this Court in *Wil-*

²² This regulation was amended on August 27, 1946, 11 F. R. 9528, by adding, "Such authority shall be granted only by or pursuant to ordinance of the Native Village of Karluk, approved by the Secretary of the Interior or his duly authorized representative."

Williams v. Fanning, 332 U. S. 490, held that the Postmaster General was not a necessary party to an action to enjoin enforcement of a fraud order. But the rule with respect to the necessity of joining the superior officer announced in those cases may not be so simply applied here.

The waters involved are the property of the Federal Government. There can be no question that the Secretary of the Interior was authorized to issue regulations relating to fishing in the disputed area. See *infra*, pp. 54, 58. Thus, this is not a case like *Philadelphia Co. v. Stimson*, 223 U. S. 605, where if the claim asserted by the plaintiff is correct the public official will be invading private rights and will have no authority in the premises. Here, the Secretary is vested with a broad discretion in dealing with this public property. Hence, while in form the judgment simply enjoins enforcement of the regulation, it does in fact, "expend itself on the public treasury or domain or interfere with the public administration." *Williams v. Fanning*, 332 U. S. 490, 493. This is clear from the fact that affirmance of the judgment below would necessarily require the Secretary to take some further action to reconcile the interests of conservation, the Indians and the salmon fishers.

• The situation is similar to that presented in *Dow v. Ickes*, 123 F. 2d 909, certiorari denied, 315 U. S. 807, in which the plaintiff asserted that the regulation there in question was void because it created

a monopoly. Dow claimed that three large corporations owned or controlled all the fish traps lying in the area excepted from the blanket provision against traps. He sought to have the Secretary either grant him a trap site in the excepted area or open a general area for traps.

The respondents here do not seek to compel the Karluk natives to stop fishing just as Dow did not seek to stop others from using trap sites. The respondents, like Dow, seek to fish in the restricted area themselves. Assuming that the second sentence of Regulation 208.23(r), granting an exclusive right of fishery to the Karluks, is not authorized by the White Act, the respondents seek (1) either to have the court by injunction extend to them the same illegal privilege they say the Secretary gave to the Karluk Village, or (2) to have the court by injunction declare open for fishing the area which the Secretary has closed to fishing. This they may not do. As the court said in the *Dow* case, at page 915:

The fundamental fallacy of appellant's argument, so far as it seeks the opening of new sites or additional general areas for fishing, is in the assumption that because the Secretary may have acted illegally in the method by which he has allocated trap sites, that confers upon appellant either the right to require him to do so also as to the sites for which he has applied or the right to have additional areas opened for the "voluntary" location and use

III

THE DISTRICT COURT ERRED IN ENJOINING ENFORCEMENT OF ALASKA FISHERIES REGULATION 208.23(r).

A. Respondents, as trespassers, are not entitled to an injunction against enforcement of Regulation 208.23(r).

Any fishing in the disputed area without the consent of the Indians would constitute a trespass upon the reservation. Being trespassers, respondents cannot "show that the act of the Secretary amounts to an interference with some legal right of theirs" which they must do to support an injunction. *Stark v. Wickard*, 321 U. S. 288, 290.

Even if it be assumed that the remedies of the White Act might not properly be invoked in that area, respondents may not enjoin the invocation of such penalties as a punishment for their trespasses. A court of equity will not thus aid a willful wrongdoer. It is not the function of the courts to advise wrongdoers as to what penalties may lawfully be imposed upon them in advance of their intended further trespasses. *National Fire Ins. Co. v. Thompson*, 281 U. S. 331; *Beck v. Flournoy Livestock & Real Est. Co.*, 65 Fed. 30 (C. C. A. 8), appeal dismissed, 163 U. S. 686; *Carolene Products Co. v. Evaporated Milk Ass'n*, 93 F. 2d 202 (C. C. A. 7)..

B. The remedies of the White Act may properly be invoked in this area.

While the disputed area was set aside for the primary use of the Karluk Indians as an Indian

Reservation in 1943, the Indians sought to exclude outside fishermen only from a small area at the mouth of the Karluk River where they did their beach seining (R. 351-352). Various commercial fishermen continued operations in this small restricted area despite notice of the existence of the reservation. Remedies then available were inadequate to accomplish the purpose of protecting Indian fishermen from interference. Although an injunction could be secured, as it was in the case of *Alaska Pacific Fisheries v. United States*, 248 U. S. 78, that remedy would be of little practical help in this instance because the unauthorized fishing in this area is by purse seines rather than by large permanent traps, the season is short, the number of fishermen numerous, and the courts remote. There is no penal statute enforceable against trespassers on Indian reservations in Alaska. In this situation, the applicability of the penal provisions of the White Act is essential to protection of the rights of the Karluk Indians in this area.²⁴

1. *The White Act may properly be applied to an Indian reservation.*—Apart from the "equality" provision of the White Act, no reason is suggested why that Act may not be applied to an area within

²⁴ These provisions were inserted in the White Act because, as the House Committee which drafted that Act declared, "There is much evidence that men may profitably fish in violation of law, the penalties being of little consequence in comparison with the value of the fish taken." H. Rep. No. 357, 68th Cong., 1st Sess., p. 3.

an Indian reservation. In fact, the practice has been to include Indian reserve waters within White Act Fishery reserves and thus make applicable to persons fishing in such areas the law, regulations, and penalties applicable to both types of reservation. See note 20, *supra*, pp. 47-48.

As we have shown *supra*, pp. 36-49, the "equality" provision of the White Act was not intended to apply to the Federal Government or its Indian wards nor did it prevent the establishment of fishery reserves for use of the Indians. Hence, the provisions of the second paragraph of regulation 208.23(r) did not, as the courts below held, violate the White Act.

The rulings of the courts below are based on the premise that the "equality proviso" requires absolute equality and that discrimination between individuals is prohibited, whatever be the reason therefor. Plainly, this is not the meaning of the White Act. For example, the Secretary can limit the number of fish traps, *Dow v. Ickes*, 123 F. 2d 909, 916 (App. D. C.) and the regulations establish a minimum distance between traps or fixed gill nets, 50 C.F.R. secs. 204.9, 205.10, 207.15, 208.8, 209.11, 211.12. The result of these regulations is to discriminate in favor of the person who first establishes the trap or net. As the court said in *Dow v. Ickes*, 123 F. 2d at p. 916:

But the statute does not guarantee equality in an absolute sense. It prohibits monopoly.

but it does not prohibit reasonable discriminations required by the purpose of conservation and limitations inherent in the type of fishing to which the Secretary's judgment must be applied.

Similarly the regulations discriminate in favor of "native Indians and bona fide permanent white residents" as to the type of gear used for the capture of king salmon. 50 C.F.R. secs. 203.3, 203.6. They discriminate against the owners of motor-propelled fishing boats and in favor of the owners of rowboats and sailboats, 50 C.F.R. secs. 203.11, 204.16. They discriminate in the Karluk area in favor of beach seiners and purse seiners as against trollers and owners of other types of gear, 50 C.F.R. secs. 208.18, 208.19. All of these discriminations are, we submit, plainly valid as a reasonable exercise of the Secretary's discretion. Cf. *Wampler v. Leconte*, 282 U. S. 172. Yet the result of any such regulation is, of course, to deprive some citizens of absolute equality.

The Karluk Indians, as we have shown, have a special interest in the area in question because it has been set aside for their exclusive use under the 1936 Act. This fact constitutes reasonable basis for making a distinction between the Karluks and others when applying the White Act to that area. The fact that enforcement of White Act regulations results in benefiting those persons who have been favored by one of the discriminations

mentioned above, does not render such enforcement unlawful. So here the fact that the Karluk Indians are specially benefited because of the reservation established for them does not render application of White Act remedies unlawful. Certainly, it cannot be said that if someone violated the regulations as to minimum distances between fish traps, the White Act remedies could not be applied against him because the owner of the legal trap enjoyed a favored position. To take such a view would render the Government powerless to deal with disorder and violence in the fisheries of the Alaskan coast.

§ 2. *The regulation was made for the purposes of conservation.*—The district court expressed the opinion that because the regulation did not limit the number of fish that might be caught, it was not in aid of conservation (R. 59). And respondents say (Br. in Opp. 10) “By no stretch of the imagination can this [the regulation] be deemed conservation.” The White Act provides that action may be taken “for the purpose of protecting and conserving the fisheries of the United States in all waters of Alaska.” However, the Act did not provide for judicial review of the Secretary’s determination that a particular regulation would serve such a purpose. As the court said of the Act on that issue in *Dow v. Ickes*, 123 F. 2d 909, 914 (App. D.C.) certiorari denied, 315 U. S. 807, “Broader discretion could hardly have been con-

ferred" and the courts "have no power to direct him [the Secretary] as to the manner in which his discretion shall be exercised."

The only basis, therefore, for overriding the Secretary's determination that the regulation aids conservation would be a finding that it was arbitrary or capricious. But that cannot be done on the record in this case because respondents made no attempt to show the facts considered by the Secretary in making his determination or that they could not constitute a rational basis for his conclusion. *Miss. Valley Barge Co. v. United States*, 292 U. S. 282, 286; *Edward Hines Trustees v. United States*, 263 U. S. 143, 148; *Louisiana & P. B. Ry. Co. v. United States*, 257 U. S. 114, 116; *United States v. Ohio Oil Co.*, 163 F. 2d 633 (C.C.A. 10); cf. *Securities and Exchange Commission v. Chenery Corp.*, 332 U. S. 191. On the contrary, both respondents and the court below seem clearly to admit that conservation will result from the regulation by contrasting at length the amount of respondents' investment in canneries and fishing equipment with the small number of Karluk Indians. Moreover, the claim that equitable relief should be had because enforcement of the regulation threatens destruction of respondent's fishing business is contradictory to any contention that conservation will not be served.

In any event, there are valid reasons for concluding that the regulation would lead to conserva-

tion of salmon. The courts below assumed that the Secretary of the Interior had simply delegated all responsibility for salmon conservation control to the native villagers. But in fact their fishing and the fishing by their permittees remained subject to Secretarial regulation. (50 C.F.R. 201.208.) Indeed the village ordinances and the permits issued have always been submitted for the approval of the Secretary of the Interior or his representative (R. 413, 466-480), and the governing regulation has made this explicit since August 27, 1946. See note 2, *supra*, p. 8. Thus there is no danger, and has never been any danger, that a local permit system would fail to carry out the conservation objectives of the Interior Department under the law. The courts below further assumed that from the standpoint of conservation it makes no difference whether fish are caught by resident natives or itinerant white men. But it is evident that a year-round resident of a community which depends for its livelihood on the salmon of a given river is more likely not to catch or permit to be caught the marginal salmon needed for perpetuation of the run than an itinerant outsider. It is in recognition of this fact that every state in the Union and every province in Canada, as well as the Territory of Alaska itself, differentiates in its conservation laws between fishing or hunting by local residents and fishing or hunting by non-residents.²⁵

²⁵ For a summary of fishing laws and regulations, see *Outdoors*, vol. XIV, No. 7, August 1946, pp. 8-9; for a summary

This distinction, which has been repeatedly upheld by the courts,²⁶ is rooted in the simple fact that a local population normally has a genuine concern for the perpetuation of its fish and game which is not shared by outsiders who can travel hundreds of thousands of miles to one location, wipe out its fish or game, and travel an equal distance in another direction, a year or decade later, to repeat the process.²⁷ The "get rich and get out" approach has been responsible for ruining many of the salmon streams of Alaska and seriously depleting others. S. Rep. No. 449, 68th Cong., 1st Sess. (1924), p. 5; Hearings, H. Committee on Merchant Marine and Fisheries, H. R. 2714, 68th Cong., 1st Sess. (1924), pp. 4, 16, 172-174. Indeed, the tragic story of the decline of the Karluk fisheries was one

of hunting laws and regulations see *ibid.*, No. 9, October 1946, pp. 8-9. Eleven states further distinguish between residents and nonresidents of the county in which fish or game is taken. These states are: Alabama, Florida, Georgia, Kentucky, Maryland, Mississippi, Missouri, North Carolina, South Carolina, Virginia, and Washington.

²⁶ *Haavik v. Alaska Packers Assn.*, 263 U. S. 510; *Anderson v. Smith*, 71 F. 2d 493 (C.C.A. 9). In *Toomer v. Witsell*, 334 U. S. 385, a state statute virtually excluding non-residents from shrimp fisheries was held to be insufficiently justified as a conservation measure to meet the strict requirement of the privileges and immunities clause. Here the standard is less strict in that the Secretary is granted an extremely broad range of discretion in determining what measures should be taken for conservation purposes. In addition, as outlined in the text, the factors justifying Regulation 208.23(r) as a conservation measure are more clear.

²⁷ "The salmon streams of California, Oregon, and Washington, having been depleted through lack of proper care, the industry has moved progressively northward to Alaska." Commissioner O'Malley in Hearings, H. Com. on Merchant Marine and Fisheries, H. R. 2714, 68th Cong., 1st Sess. (1924), p. 4.

of the major factors leading to the enactment of the White Act, *op. cit.*, pp. 4, 271. The Karluk natives, whose reservation includes the lower Karluk River and adjacent uplands (R. 286), have an interest in maintaining the Karluk salmon supply which is as great as their interest in their lives and the lives of their children. The future of the Karluk salmon supply will largely depend upon the extent to which that interest can be asserted.²⁸

The necessity of control is evident from the decline of approximately 75 percent in the red salmon catch at Karluk from the first decade of intensive fishing operations by nonresidents (1888-1897) to the decade from 1927 to 1936.²⁹ Whether the method of control selected by the Secretary is, under all the circumstances, the best one or whether it may need amendment in the future are questions to be

²⁸ The modern trend of conservation is to rely increasingly on the cooperation of local landowners in protecting and restoring the wildlife that is dependent upon their lands and waters. "The fundamental principle which must govern the regulation of hunting is that the average human can be induced to conserve voluntarily what stays on his own land, so that it is available for his own use, but only the exceptional individual will voluntarily conserve what he shares with the community at large. * * *" (Leopold, Aldo, *Game Management*, p. 209.) Cf. testimony of Commissioner O'Malley: "It is not human to expect any canner, however much he realizes that streams are being depleted by over fishing, to limit his own catch, when he knows that his competitor will thankfully accept and put in cans whatever fish he spares for spawning purposes." (Hearings, p. 3, *supra*, Note 21, p. 48.)

²⁹ *Fluctuations in Abundance of Salmon of the Karluk River, Alaska*. (Fishery Bulletin No. 39, Table L.) A 50 percent decline was reported in 1924. Hearings, H. Com. on Merchant Marine and Fisheries, H. R. 2714, 68th Cong., 1st Sess. (1924), pp. 4, 271.

resolved by the Secretary and not the courts. Certainly, until the contrary appears, it may not be assumed that the Karluk natives will issue so many licenses that the fisheries will continue to be depleted.

The fact that the regulation serves the dual purpose of protecting the Indians and conserving the salmon does not invalidate it. Cf. *Oklahoma v. Atkinson Co.*, 313 U.S. 508, 533-534. On the contrary, it is the Secretary's duty to consider all factors which in his judgment help to determine whether a particular action is advisable. Conservation regulations always involve questions of financing, enforcement, safeguarding of property rights,³⁰ and other distinct but related factors. That is why the power to issue conservation regulations is not a purely technical matter of biology but a matter of judgment with which the courts have traditionally refused to interfere.

One of the factors which must necessarily be considered in administering such a program is the definition of the rights of interested persons and the prevention of trespassing, poaching, etc., so that ordinary activities will not be disrupted by disputes and conflicts. Certainly, it is within the

³⁰ See *Thomson v. Dana*, 52 F. 2d 759, 764 (D. Ore.), where, as in the case at bar, boat fishermen tried to upset a regulation on the ground that it gave undue advantage to owners of the beach, and the court rejected the attack, pointing out that it was perfectly consistent with good conservation practice to recognize the rights of shore owners to "prevent trespass on their own lands."

purpose of the White Act to promote fishing, that the Secretary should have power to prevent boats from interfering with the operation of beach seines as happened here (R. 360-361).

In short, while the courts below purport to recognize the wide discretion given to the Secretary in the White Act, acceptance of their position would seriously impair, if not annul, that grant of discretion. We have shown that the salmon supply at Karluk has been very seriously depleted. However, the Secretary could not completely close the area to fishing since such action would destroy the Karluk Indians. Respondents' position and that of the courts below is that the Secretary must either leave the area open for fishing, contrary to the interests of conservation, or must close it absolutely with the resulting impoverishment of the Indians. Surely Congress did not intend to place the Secretary in such an impossible position. The very purpose of the grant of discretionary powers was to make avoidance of such a dilemma possible.

CONCLUSION

The judgment of the court below should be reversed.

Respectfully submitted,

PHILIP B. PERLMAN,

Solicitor General.

A. DEVITT VANECH,

Assistant Attorney General.

STANLEY M. SILVERBERG,

Special Assistant to the Attorney General.

ROGER P. MARQUIS,

S. BILLINGSLEY HILL,

Attorneys.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1947 48

FRANK HYNES, REGIONAL DIRECTOR, FISH AND WILDLIFE
SERVICE, DEPARTMENT OF THE INTERIOR, *Petitioner,*

v.

GRIMES PACKING CO., KADIAK FISHERIES COMPANY,
LIBBY, McNEILL & LIBBY, FRANK McCONAGHY &
CO., INC., PARKS CANNING CO., INC., SAN JUAN
FISHING & PACKING CO., AND UGANIK FISHERIES,
INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

EDWARD F. MEDLEY,
FRANK L. MECHEM,
W. C. ARNOLD,
Seattle, Washington,
Attorneys for Respondents.

COVINGTON, BURLING, RUBLEE,
ACHESON & SHORB,
Washington, D. C.,
Of Counsel.

March, 1948

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1947

No. 613

FRANK HYNES, REGIONAL DIRECTOR, FISH AND WILDLIFE
SERVICE, DEPARTMENT OF THE INTERIOR, *Petitioner,*

v.

GRIMES PACKING CO., KADIAK FISHERIES COMPANY,
LIBBY, McNEILL & LIBBY, FRANK McCONAGHY &
CO., INC., PARKS CANNING CO., INC., SAN JUAN
FISHING & PACKING CO., AND UGANIK FISHERIES,
INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 42-61) is reported at 67 F. Supp. 43. The opinion of the Circuit Court of Appeals (R. 499-514) is reported at 165 F. (2d) 323.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on November 21, 1947 (R. 515). The petition

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for a writ of certiorari was filed on February 20, 1948. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

The questions indicated by Petitioner (Pet., pp. 2-3) do not appear wholly accurate, nor do they indicate the relationship among the several questions involved. A more informative statement, we believe, is as follows:

The Secretary of the Interior, having created an alleged "Indian Reservation" in ocean waters off Karluk, Alaska, has attempted to enforce it by a regulation imposing the penalties and forfeitures of a fishing conservation statute, the White Act, upon anyone who fishes there except Karluk Indians and those to whom those Indians may grant permits. Respondents have enjoined the Regional Director of the Fish and Wildlife Service, who enforces the penalties and forfeitures under the White Act, from enforcing the regulation. The questions presented are:

1. Whether the drastic criminal and forfeiture sanctions of the White Act—the basic fisheries conservation statute for Alaska—may be used to coerce recognition of an Indian reservation alleged to have been created in ocean waters off Karluk.

2. If the first question is answered in the affirmative, whether the regulation establishing an exclusive fishery in designated Indians and their permittees does not violate the basic prohibition against establishment of an exclusive fishery contained in the White Act.

3. If both prior questions are decided against respondents, then whether the Act of May 1, 1936, a

minor technical amendment to an earlier act, granted to the Secretary of the Interior authority to include Alaskan ocean waters under the jurisdiction of the United States within Indian reservations.

4. Whether the District Court properly granted the relief prayed.

STATUTES INVOLVED

The relevant portions of the statutes involved (Section 2 of the Act of May 1, 1936, c. 254, 49 Stat. 1250, U. S. C., Title 48, Sec. 358a; and Sections 1, 6, 7 and 8 of the Act of June 6, 1924 (White Act), c. 272, 43 Stat. 464, as amended, U. S. C., Title 48, Secs. 221 *et seq.*), of Public Land Order No. 128 of May 22, 1943 (8 F. R. 8557), and of Section 208.23 of the Alaska Fisheries Regulations (Title 50, C. F. R., 11 F. R. 3105 as amended by 11 F. R. 9528) are set out in the Appendix.

STATEMENT

The petition for certiorari does not refer to the findings of fact made by the District Court which, having been approved by the court below, will not be further reviewed here. *United States v. O'Donnell*, 303 U. S. 501, 508. Those findings may be summarized as follows:

The seven respondents are corporations or business concerns appropriately qualified to do business in Alaska (R. 24-26). The petitioner, a resident of Juneau, Alaska, was at all relevant times and is now Regional Director for Alaska of the Fish and Wildlife Service of the Department of the Interior, with full power to enforce United States Fishery Laws in Alaska (R. 26).

Each respondent is engaged in the taking and canning of salmon in Alaska and each has had a cannery

on Kodiak Island for from 7 to 24 years, respectively (R. 27-28). There have been salmon canneries on Kodiak Island, however, since before 1900. The value of respondents' canneries ranges from \$85,000 to \$331,000, and the investment in floating equipment ranges from \$45,000 to \$220,000 (R. 27, 28, 29). Pre-seasonal expenditures for each company ranged in 1946, a typical year, from \$30,000 to \$665,000 (R. 28-29); and each before the opening of the season of 1946 transported from 22 to 247 employees to Alaska (R. 28-29). Each also employed from 15 to 120 fishermen (R. 28-29).

Respondents obtain their salmon from an area contiguous to their canneries including the ocean waters embraced in the purported Karluk Reservation as described below (R. 27, 29). There is no available replacement for this source of supply, and without it respondents could not operate their canneries profitably (R. 35).

In May, 1943, Public Land Order 128 (Appendix, *infra*) was signed by the Secretary of the Interior. This Order purported to establish a Karluk Indian Reservation for a vast land area embracing about fifteen miles of the shore line of Shelikof Strait, and including (Par. 2):

"The area described above and the water adjacent thereto extending 3,000 feet from the shore line at mean low tide * * *"

The Order claimed as its foundation Section 2 of the Act of May 1, 1936 (Appendix, *infra*); the native residents of the land area voted their approval on May 23, 1944 (R. 32).¹ This reservation includes the waters described above in which respondents have fished for

¹ The vote (R. 462) was 46 for, 0 against, with 11 eligible voters absent. In all, 57 adult Indians are concerned in the reservation.

many years (R. 27, 29). From the creation of the reservation in 1944 respondents have challenged its validity and particularly the attempted inclusion of ocean waters (R. 32).

In 1946, Section 208.23(r) (Appendix, *infra*) of the Alaska Commercial Fisheries General Regulations was issued. This section closed to salmon fishing all the waters of the Karluk Reservation as established under Public Land Order 128 and added the following proviso:

“The foregoing prohibition shall not apply to fishing by natives in possession of said reservation, nor to fishing by other persons under authority granted by said natives (49 Stat. 1250).”

The regulation purports to be based on the White Act of 1924 (Appendix, *infra*), a measure for the conservation of the fisheries of Alaska. Section 6 of the White Act contains enforcement provisions, including seizure of boats, gear and equipment as well as criminal prosecution of violators. Under that Act petitioner has been properly authorized to make those arrests and seizures (R. 33-34).

Since publication of Section 208.23(r) of the Commercial Fisheries Regulations, petitioner has continually threatened, except as restrained by the court below, to seize the fish, boats, and gear of respondents utilized in fishing in the Karluk waters (R. 26-27, 34).

Respondents have at all times insisted that Section 208.23(r) was not authorized by the White Act, because it is patently not a conservation measure and because it plainly violates Section 1 of the White Act, which forbids the granting of any “exclusive or several right of fishery” by granting an exclusive right of fishery to the Karluk Indians and their permittees. They have at

all times urged that the drastic penal and seizure provisions of a fishery conservation statute can in no event be directly employed to enforce an asserted Indian reservation under an entirely different statute.

On the basis of these facts, the District Court found that respondents would suffer a substantial and irreparable loss without an adequate remedy at law if petitioner were to prevent them from fishing in the waters in question (R. 35). Respondents would have to close their Kodiak canneries were their boats, gear and equipment seized (R. 36), and the threat of arrest and imprisonment would have kept their crews out of these waters (R. 36).

On the basis of these Findings of Fact the District Court concluded as a matter of law (R. 39-40) that (1) Public Land Order 128 is invalid insofar as it covers ocean waters; (2) that Section 208.23(r) is null and void; and (3) that a permanent injunction should be granted.

The court below affirmed the decree on November 21, 1947 (R. 515). It held that the Secretary of the Interior was not authorized by Section 2 of the Act of May 1, 1936 to create the reservation in ocean waters below low water mark. The court reviewed the history of non-monopoly policy in Alaskan fisheries; pointed out that the Secretary's action gave 57 adults a complete monopoly (except for such rights as they might sell) in waters which yielded in 1946 almost 4,000,000 salmon; and concluded that neither on policy nor on language could the authorization to the Secretary in the 1936 Act to withdraw "public lands" for reservations be extended to open ocean waters. Further, the court held that Paragraph 208.23(r) is not otherwise valid as a conservation measure, and was a plain violation of the anti-monopoly

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provisions of the White Act. Finally, it held that the Secretary of the Interior was not a necessary party (R. 499-514).

On February 20, 1948, the petition for certiorari was filed.

ARGUMENT

Section 208.23(r) of the Regulations, here involved, is one paragraph of the comprehensive regulations for the "protection of the Alaska Commercial Fisheries," issued annually by the Secretary of the Interior pursuant to the White Act of 1924 (Appendix, *infra*). That Act, issued after years of agitation, confers unprecedented powers on the Secretary to issue *conservation* regulations, and to insure that conservation will be effected, it makes violations punishable not only by seizure and confiscation of boats, nets or any other gear, as well as all fish caught in violation, but also by heavy fines and imprisonment. Further to insure conservation, powers of arrest and seizure, comparable to those of a United States marshal, are given to designated employees of the Fish and Wildlife Service.

Yet to prevent any possible abuse of the regulatory powers thus delegated, several specific prohibitions were also written into the White Act, to which all regulations must conform. We believe that Section 208.23(r) is in violation of several of those provisions—those against the creation of monopolies over fishing rights in an area in which fishing is permitted, those against the denial to any citizen of the right to fish wherever fishing is permitted, and those against regulations not general in character.

The court below did not find it necessary to pass on those issues, although they are likewise fatal to peti-

tioner's position. Nor did it pass on the further point, which respondents urged below: that it is wholly improper to make use of the criminal and forfeiture sanctions of the White Act to enforce an administrative determination made under a *different* statute and for a different purpose—more specifically, to make effective purported Indian reservations in ocean waters. This, too, destroys petitioner's case. We contend that on all these grounds—the two just mentioned as well as the invalidity of the proposed reservation, upon which the court below rested its decision—the injunction was properly issued.

Before we deal with these specific issues, however, a word is warranted on the setting of the present case. For many years, through administrative action, the Department of Interior has endeavored to secure for selected Indian tribes or villages of Alaska *exclusive* rights to the *commercial* fisheries of the Territory. (The word "commercial" is important; the right of these natives to fish for personal or family use as food has never been challenged and continues wholly unrestricted. This case does not involve that problem; it concerns the commercial catching of fish for sale.)

Originally, the Department attempted to exclude non-Indian commercial fishing by attempting to recognize administratively asserted exclusive Indian rights based on alleged aboriginal possession of ocean waters. These efforts have never been judicially sanctioned, and in view of the recent decision in *Miller v. United States*, 159 F. (2d) 997 (C. C. A. 9th, 1947), probably never will be.

In 1943, however, the Department took a new tack, by attempting to use a minor 1936 amendment to the Wheeler-Howard Indian Reorganization Act (Appen-

dix, *infra*) to include in this Indian reservation at Karluk, on Kodiak Island, a large segment of ocean waters long used by Indians and non-Indians alike for commercial fishing. Some 57 adult Indians and their families were thus attempted to be given the exclusive right to fish, or on their terms to admit non-Karluk residents to fish, in an area which yields many millions of dollars worth of fish annually. The validity of this attempt was immediately challenged by respondents and others. Yet for two years no effort was made to enforce the asserted reservation by the proper remedies available for any lawfully created Indian reservation. *Uf. Alaska Pacific Fisheries v. United States*, 248 U. S. 78 (1918), affirming 240 Fed. 274.

Instead of normal and usual judicial enforcement, then, we have the situation presented in this case—the *in terrorem* method of threats to use the drastic *conservation* sanctions under the White Act to make the alleged reservation effective. It is that final course of conduct which forced respondents to obtain injunctive relief. The decision below, which affirmed the order of the District Court granting such relief, is plainly correct, on several grounds, and in no wise warrants review by this Court.

I.

THE DECISION BELOW IS CLEARLY CORRECT, NOT ONLY FOR THE REASONS GIVEN IN THE OPINION, BUT FOR SEVERAL OTHER REASONS AS WELL.

As indicated above, petitioner, in order to prevail in this case, must prevail on *each* of three points. He must demonstrate that it is proper to utilize the *conservation of fishing* sanctions of the White Act to effectuate an Indian reservation. He must show that

even if White Act sanctions are available, that Section 208.23(r)—the regulation here involved—can, in some fashion, be squared with the anti-monopoly and other specific limitations of the White Act. If he prevails on both of those points, he must finally show that the reservation of ocean waters is authorized by Section 2 of the Act of May 1, 1936. We believe he can prevail on none of these points.

A. SECTION 208.23(r) IS INVALID BECAUSE IT PURPORTS TO USE CONSERVATION SANCTIONS TO ACCOMPLISH NON-CONSERVATION PURPOSES.

There is no doubt that the White Act is a *conservation* statute. Section 1 begins "*That for the purpose of protecting and conserving the fisheries of the United States in all the waters of Alaska*", the Secretary may issue regulations. Yet Section 208.23(r) has no reference or application to that purpose. The subsection begins by including in the "closed" area the waters adjacent to the Karluk Reservation, but it then adds—with a statutory reference to an Indian reservation statute, that —

"The foregoing prohibition shall not apply to fishing by natives in possession of said reservation, nor to fishing by other persons under authority granted by said natives. (49 Stat. 1250)"²

By no stretch of the imagination can this be deemed conservation. This regulation is no more than a designation of who may fish, and a subdelegation of author-

² After suit was filed, the regulation was amended (11 F. R. 9528) by adding: "Such authority shall be granted only by or pursuant to ordinance of the Native Village of Karluk, approved by the Secretary of the Interior or his duly authorized representative."

ity as to who may decide how many men may fish. It is not related to vessels, gear or catch. It neither prohibits nor limits fishing. Although petitioner, in his brief below, made a half-hearted attempt to distill out a conservation purpose, the petition here apparently recognizes the fallacy of that argument, and does not even claim that conservation is a basis for the challenged section. As the court below stated (R. 501):

“The regulation has no other purpose than to create the Indians’ monopoly on the supposition that an Indian reservation in fact has been created and that the Secretary has a right to permit the Indians to fish there and deny the right to all other fishermen not so licensed.”

Plainly, therefore, the regulation, which attempts to use White Act *conservation* sanctions to enforce an alleged Indian reservation must fall. Had Congress wished to punish trespass on an Indian reservation by sanctions of forfeiture, fines and imprisonment, it would have said so. It has not. “To supply omission transcends the judicial function.” *Iselin v. United States*, 270 U. S. 245, 251. More specifically, as the Court stated in *United States v. Evans*, No. 15, October Term, 1947, decided March 15, 1948: “In our system, so far at least as concerns the federal powers, defining crimes and fixing penalties are legislative, not judicial, functions.” See also *L. P. Stewart & Bro. v. Bowles*, 322 U. S. 398, where the Court stated (at p. 404):

“We agree that it is for Congress to prescribe the penalties for the laws which it writes. It would transcend both the judicial and administrative function to make additions to those which Congress has placed behind a statute.”

B. SECTION 208.23(r) IS INVALID BECAUSE IT IS IN CLEAR VIOLATION OF SECTION 1 OF THE WHITE ACT.

Section 1 of the White Act requires, *inter alia*—

“that every such regulation made by the Secretary of the Interior shall be of general application within the particular area to which it applies, and that no exclusive or several right of fishery shall be granted therein, nor shall any citizen of the United States be denied the right to take, prepare, cure or preserve fish or shellfish in any area of the waters of Alaska where fishing is permitted by the Secretary of the Interior.”

That language is not ambiguous. It has not been repealed or modified. It is, indeed, the heart of the Act, as its legislative history shows. H. Rep. No. 357, 68th Cong., 1st Sess., p. 2. Yet measured against these requirements,^a the challenged regulation cannot stand. It is not of general application: an area is first closed completely, then opened for Karluk Indians and those they may temporarily license for fee or any other conditions they may care to impose.^a Conversely, it denies to citizens of the United States the right to take fish in waters where fishing is permitted: here only Karluk Indians (and their “permittees”) may fish. Finally, the regulation necessarily results in an exclusive right of fishing: a more perfect monopoly could scarcely be devised than one which permits, in an area otherwise closed, one group alone to fish and to license others to do so on their own terms.

Petitioner, indeed, does not deny the conflict, but attempts rather to excuse it by the argument that the anti-monopoly provisions are not applicable to “Indian fisheries”. Reference is made both to legislative history and to administrative practice. Neither, in point of fact, support the petitioner’s conclusion.

Legislative history.—The White Act was passed as a result of widespread dissatisfaction with the system of so-called "fishery reservations" which had been created by executive orders in the early 1920's, and in which fishing was permitted only to designated individuals or companies. See H. Rep. No. 357, 68th Cong., 1st Sess., p. 2. The anti-monopoly provisions of Section 1 of the Act were designed to forbid this practice in the future: conservation was to be achieved by limitations on season, on places for fishing, and on type of gear, but not by permitting only certain persons to fish to the exclusion of all others. It was designed to forbid, in other words, *exactly* what Section 208.23(r) attempts to do.

There is nothing in the legislative history of that Act which indicates an intention to exempt Indian fisheries from its operation. Indeed, its language is specifically to the contrary: "nor shall *any citizen* of the United States be denied the right to take * * * fish * * * in any area of the waters of Alaska where fishing is permitted." Congress did not prohibit one exclusive right in favor of another. The Indians would benefit, because they could fish where anyone else could fish, and they were of course in favor of the bill. They did not seek, however, and they were not accorded, any exclusive rights of their own.

The petition refers (p. 18) to an exception in favor of Indians in one of the two bills considered when the White Act was in the House Committee (H. R. 4826, 68th Cong., 1st Sess.). The reference is wholly misleading; indeed, it has never been suggested in briefs or arguments in the courts below. Not only was H. R. 4826 not the bill which finally became the White Act, but even in H. R. 4826 the provision to which the peti-

tion refers was only a "grandfather" clause, with no prospective application.³ The hearings and reports on the White Act contain no discussion of this provision. Even if it had been included in the White Act, it would not have authorized Section 208.23(r); those Karluk waters have been fished by both Indians and non-Indians for over a century. This faint attempt to use unrelated legislative history to reach a result squarely in the teeth of the Act itself is evidence of the flimsy foundation upon which the whole of petitioner's argument rests.

Administrative construction.—Nor is the case for administrative construction any better. One may doubt that a positive prohibition may, under any circumstances, be avoided by "administrative interpretation". In any case, no such administrative interpretation exists. The argument seems to rest (Pet. p. 18) on the fact that the announcements of the Department of Commerce in 1924 quoted the Act of Congress and the Executive Order establishing the Annette Island Indian Reservation, and the Executive Orders establishing a few other Indian reservations. This is disingenuous: the announcements did not in any way relate these Executive Orders to the regulations issued under the White Act.

Moreover, the argument is misleading. The fact is, that *except by special statute* at the Annette Islands, no Indian or Eskimo reservation in Alaska has ac-

³ The clause in H. R. 4826 was as follows: "*Provided further, that this provision [forbidding an exclusive right of fishery] shall not affect any right exercised by the descendants of the aboriginal people of Alaska or those of the half blood who are descendants of the aborigines which were exercised and claimed up to the passage of this act.*"

corded any exclusive or special right of commercial fishery. The Afognak Forest and Fish Culture Reserve, for example, to which petitioner refers (p. 19) did not grant an exclusive fishing right to the Indians; it simply prohibited *all* fishing. See Proclamation No. 39 of December 24, 1892, 27 Stat. 1052. The fish hatchery there was abandoned in the late 1920's, however, and since 1929 the Afognak waters have simply been subject to the general commercial fisheries conservation regulations. See Bur. Fisheries Doc. No. 1064, pp. 201, 206 (1929). The facts on the other reservations mentioned by petitioner (p. 17n) are either similar to those at Afognak, or do not contain any ocean waters within their boundaries. Certainly no "administrative interpretation"—supporting the establishment of an exclusive fishery under a statute which specifically prohibits just exactly that—can be gleaned from a reserve in which no one could fish until 1929, and all were permitted equal fishing rights thereafter.⁴

To sum up: In 1922 the Government began a fishing reservation and permit system, without statutory sanction. By 1924 Congress, reflecting the widespread dissatisfaction with the device, forbade it by the flat prohibitions of Section 1 of the White Act. Now it is proposed to recreate the old reservation and permit system, with but two differences: (a) under the new program, the permittee must pay a tax to the Indians

⁴ The Tyonek reservation to which petitioner makes particular reference (p. 17) is a reservation of *land area only*. See Exec. Order No. 2141, dated February 27, 1915. The decision of the Solicitor of the Interior Department (49 L. D. 592) to which petitioner makes reference as showing a lease of fishing privileges (p. 17) has primary reference to a cannery site; fishing privileges, in view of the extent of the reservation, must have referred to the Chuit River, which flows through the reservation.

and meet their other conditions to get the permit, which was not required under the old system; and (b) under the new program, permits are granted and are revocable on the signature of a Karluk Indian, rather than of the Secretary.

We do not believe that the permit system 1947 style would have pleased Congress any more than the 1922-1923 model. Whether it might or not, all exclusive rights were specifically prohibited by the White Act. The "exclusive rights" permit system cannot, by changes of detail, be legally resurrected after its careful, considered, and unqualified Congressional interment in 1924.

C. MOREOVER, AS THE COURT BELOW HELD, THE PURPORTED RESERVATION OF OCEAN WATERS IS INVALID.

Not only must petitioner prevail on the two issues just discussed in order to sustain Section 208.23(r), but he fails in any event unless he also prevails on the issue decided against him by the court below. That court, and the District Court, have held that the Act of May 1, 1936 (Appendix, *infra*), did not authorize the creation of a reservation in ocean waters. The lower courts are clearly correct.

Section 2 of the 1936 Act, upon which petitioner relies for authority to include ocean waters in the Karluk Indian reservation, is as follows:

That the Secretary of the Interior is hereby authorized to designate as an Indian reservation *any area of land* which has been reserved for the use and occupancy of Indians or Eskimos by section 8 of the Act of May 17, 1884 (23 Stat. 26), or by section 14 or by section 15 of the Act of March 3, 1891 (26 Stat. 1101), or which has been heretofore reserved under any executive order and placed under the jurisdiction of the Department of the

Interior or any bureau thereof, *together with additional public lands adjacent thereto*, within the Territory of Alaska, or *any other public lands* which are actually occupied by Indians or Eskimos within said Territory: *Provided*, That the designation by the Secretary of the Interior of *any such area of land* as a reservation shall be effective only upon its approval by the vote, by secret ballot, of a majority of the Indian or Eskimo residents thereof * * * *Provided further*, That nothing herein contained shall affect any valid existing claim, location, or entry under the laws of the United States, whether for homestead, mineral, right-of-way, or other purpose whatsoever, * * *." (Italics supplied.)

The issue is whether these several references to "public lands" or "area of land" mean not only land, but ocean waters. We do not doubt, of course, the power of Congress to include ocean waters in an Indian reservation; indeed, on rare occasions, it has done so. *Cf. Alaska Pacific Fisheries v. United States*, 248 U. S. 78. Here, not only the language of the 1936 Act, but also its legislative history deny petitioner's claim that Congress delegated that power to the Secretary of the Interior.

Even were the words of Section 2 not "public lands" but simply "lands", we believe that the decisions of this Court indicate that it would not grant to the Secretary the claimed unlimited power to reserve ocean waters. Congress has *never* disposed of lands under the ocean by *general* laws such as this; each such occasion has been by particular Congressional action. *Shively v. Bowlby*, 152 U. S. 1, 57. And even when Indian rights are concerned, "land" does not mean submerged land; as this Court has said, disposals of submerged land by the United States during the territorial period "should not be regarded as intended

unless the intention was definitely declared or otherwise made very plain." *United States v. Holt State Bank*, 270 U. S. 49, 55. There is certainly no definite declaration here—quite the contrary, in fact—and there is not even a scintilla of evidence that Congress meant by the 1936 Act to authorize the Secretary of the Interior in his discretion to make any or all of the northern Pacific ocean into Indian reservations.

Moreover, as the court below points out, the reference here is not only to "lands" but to "public lands". That phrase had been construed for over a half century to exclude ocean waters. *Mann v. Tacoma Land Co.*, 153 U. S. 273, 284; *Newhall v. Sanger*, 92 U. S. 761, 763. This Court had so construed it no more than six months before the 1936 Act was passed. *Borax Consolidated, Ltd. v. Los Angeles*, 296 U. S. 10, 17. Congress undoubtedly intended in the May 1, 1936 Act that the phrase "public lands" would have its normal meaning.

Petitioner cites no decision to the contrary. His most persuasive argument (Pet. p. 18) is that in two decisions (*Alaska Gold Recovery Co. v. Northern M. & T. Co.*, 7 Alaska 386, 398 (1928); and *Dow v. Ickes*, 123 F. (2d) 909, 914 (App. D. C. 1941), *certiorari denied*, 315 U. S. 807) the opinions refer to ocean waters, and the lands submerged beneath them, as "public domain". No doubt "public domain" is a broader concept; were that the language of the 1936 Act, we should have a different question. The 1936 Act, however, deals with "public lands."

Petitioner also refers (p. 11) to one statute—the Act of March 3, 1891 (c. 561, 26 Stat. 1095)—in which, he asserts, the context shows that the phrase "public lands" was there intended to include ocean waters. It

is difficult to see how this statute, passed almost 50 years ago, can be said to be in *pari materia*, as petitioner asserts (p. 11), particularly since the section of it on which petitioner bases his argument was repealed only seven years later by the Act of March 14, 1898 (c. 299, 30 Stat. 409). But even in discussing this 1891 Act petitioner errs in asserting that the phrase "public lands" in Section 12 includes ocean waters. The authority to purchase "public lands" in Section 12 was limited to persons "in possession of and occupying public lands"; title to ocean waters never was, and never could be obtained under the provisions of this Act. The provision in Section 14 cited by petitioner (p. 12), requiring all patents issued under Section 12 to reserve the right of the United States to regulate the taking of salmon, undoubtedly was intended by Congress to permit it to protect the salmon runs in the fresh water streams and on the tidelands regardless of the rights of the abutting owners. The provision has not been inserted in any patent issued by the Land Office since the repeal of the 1891 Act in 1898.

But if any conceivable doubt exists as to the meaning of "public lands" in the 1936 Act, it is set at rest by its legislative history. The 1936 Act is an amendment to the Wheeler-Howard Act of 1934 (c. 576, 48 Stat. 984). The Wheeler-Howard Act had as its basic purpose the permitting of an experiment in Indian communal ownership of property under the guidance of the Secretary of the Interior. It conferred no power to create reservations. Section 13 of that Act made certain sections applicable to the Territory of Alaska. As the Secretary of the Interior said in his letter request for the 1936 amendment to the Congress, Section 17 of the Wheeler-Howard Act, which authorized the

incorporation of Indian tribes, had, unintentionally, not been applied to Alaska. He recommended the bill to correct the error. H. Rep. No. 2244, 74th Cong., 2d Sess., p. 4. When the House Committee on Indian Affairs reported the bill, *without hearings of any sort*, it stated (*id.*, p. 3):

“This measure merely seeks to allow the Indians of Alaska to participate in the benefits of existing law to the same extent and manner as the Indians of the United States proper, a condition that does not exist now because of what appears to be an unintentional omission in the Wheeler-Howard Act as stated by the Secretary of the Interior
* * *

The only reference to Section 2 of the 1936 Act appearing anywhere in the legislative history is in the letter from the Secretary of the Interior commenting on the bill. He said that lands which should have been segregated for the Indians under the Act of May 17, 1884, and the Act of March 3, 1891, had not been so segregated. His only statement as to the meaning of the section was (H. Rep. No. 2244, *supra*, p. 4):

“Section 2 of the bill which gives to the Secretary of the Interior power to designate certain lands as Indian reservations is, therefore, a logical sequence of the legislative history regarding Indian lands in Alaska and *provides a method by which the financial aid provisions of the Indian Reorganization Act may be extended to those Indians and Eskimos of Alaska who occupied established villages.*” (Italics supplied)

Nothing appears—literally not a word—which states or even suggests that when Congress used the words “public lands” in Section 2 of this amendment, it had

in mind lands under ocean waters. There was no mention of "fishing" and no reference to "waters" in the Secretary's letter or in the brief House or Senate reports. The 1936 amendment, beyond the shadow of a doubt, was intended by Congress simply to extend to the Indians and Eskimos of Alaska the benefits of the Wheeler-Howard Act.

If petitioner is correct, this seemingly innocuous and undiscussed minor amendment to the Wheeler-Howard Act has given the Secretary of the Interior a power of life and death over the Alaskan salmon industry. There is no limit at all put upon his power, as petitioner interprets it, to include any or all of the fisheries of Alaska within Indian reservations. We submit Congress would not have taken such a step without at least discussing its significance on the floor of the Congress and without giving the industry a chance to be heard. Congress has previously dealt with such legislation only after long hearings and long debate. And justly so, for Alaskan waters produce an annual pack of salmon worth about \$90,000,000, which makes it far and away the chief industry of Alaska. The basic fishery statute—the White Act—was passed after the President of the United States personally inspected the situation in Alaska, and after full hearings and long debate.

It is unbelievable that Congress should have accorded to the Secretary of the Interior in this casual manner a *carte blanche*. One would have to believe that Congress had thus cavalierly reversed—without debate, without discussion, without hearing, without reference to the fact that it was doing so—two long established policies, the one against disposing of navigable waters by general legislation, and the other against summary

disposition of Alaskan fishing rights. It is far easier to believe that when Congress used the words "public lands" in the 1936 statute, it means the uplands of Alaska.

The inference which petitioner seeks to create (p. 15) that the 1936 Act was a recognition by Congress that the Alaskan natives needed, and should have, fishing reserves is thus wholly misleading; if the Secretary had that purpose in mind when he transmitted the proposed bill to Congress, it was well concealed. Congress, certainly, had no thought that fisheries were involved at all. Petitioner's reference (p. 16) to *Alaska Pacific Fisheries v. United States*, 248 U. S. 78, which interpreted a specific and unique statutory provision in which Congress in 1891 had created on an individual and appealing showing a specific reservation for a specific group of Indians is thus wholly inapposite.

Perhaps the assertion does not warrant an answer, but petitioner is of course in error in implying (p. 15) that unless the Indians have exclusive rights of commercial fishery at Karluk they will go unfed, unclothed, uneducated and indeed unburied. Actually, the Karluk Indians have never had any exclusive right of fishery; the area has been fished for over a century by non-natives and natives alike. See Interior Department, *Report on Population and Resources of Alaska at the Eleventh Census—1890* (G. P. O. 1893), pp. 76, 79; *Salmon and Salmon Fisheries of Alaska* (G. P. O. 1899), p. 144; Marshall McDonald, Commissioner of Fisheries, in *Seal and Salmon Fisheries and General Resources of Alaska* (G. P. O. 1898-1899), Vol. 2, p. 424; *Pacific Steam Whaling Co. v. Alaska Packers Ass'n.*, 138 Cal. 632, 72 Pac. 161 (1903). The Karluk natives, as the court below points out (R. 505), have fished on their own account, have been employed as

fishermen on the boats of the fishing companies, and have also worked in the canneries. The court adds (R. 505):

"There is no evidence that the catch of the white fishermen in the waters sought to be reserved for the Indians in any way lessened the catch of the fifty Indian families or the wages they earned. It is fair to assume that since six hundred odd white fishermen used these waters without interfering with each other, the 57 Indian fishermen would find no greater interference. Indeed, so far as their purchasing power is concerned, it well may be that it was much higher than before the white men established their plants on Kodiak Island."

II.

THE DECISION BELOW IS NOT OF GENERAL IMPORTANCE OR APPLICATION

So far as we know, Section 208.23(r) is unique: no other attempt has ever been made to enforce, by the severe conservation sanctions of the White Act, compliance with an Indian reservation created under a wholly different statute. Petitioner does not assert that the decision will affect any other sections of the Alaska Commercial Fisheries Regulations.

Petitioner's chief contention that the case is of importance relates to its alleged effect on other reservations (p. 19). Actually, as we have already pointed out, there is no Indian or Eskimo reservation in Alaska which has accorded, or now accords, any exclusive or special right of commercial fishery, under *any* statute, with the sole exception of one reservation created in 1891 *by a special statute*. Certainly the decision does not cast doubt on that reservation, and there is in fact no other commercial fishery reservation to be affected.

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<i>United States v. California</i> , 332 U. S. 19	61, 67
<i>United States v. Cooper Corp.</i> , 312 U. S. 600; 606-607	73
<i>United States v. Holt State Bank</i> , 270 U. S. 49	9, 63
<i>United States v. Jefferson Electric Mfg. Co.</i> , 291 U. S. 386, 396	73
<i>United State v. Mackey</i> , 214 Fed. 137, 146 (E. D. Okla. 1913); <i>rev'd on other grounds</i> , 216 Fed. 126 (C. C. A. S. 1914)	63
<i>United States v. O'Donnell</i> , 303 U. S. 501, 508	3, 82
<i>Vickery v. Yahola Sand & Gravel Co.</i> , 158 Okla. 120, 12 P. (2d) 881, 883-884 (1932)	63
<i>Warner Valley Stock Co. v. Smith</i> , 165 U. S. 28	77
<i>Webster v. Fall</i> , 266 U. S. 507	77, 78
<i>Williams v. Fanning</i> , 332 U. S. 490	9, 77, 78
<i>Worthern Lumber Mills v. Alaska Juneau Gold Mining Co.</i> , 229 Fed. 966, 969 (C. C. A. 9, 1916)	52
<i>Young v. Goldstein</i> , 97 Fed. 303, 307 (D. C. Alaska 1899)	51

STATUTES AND BILLS:

Act of May 17, 1884, c. 53, 23 Stat. 24, 26, U. S. C., Title 48, Sec. 356	<i>passim</i>
Act of March 3, 1891, c. 561, 26 Stat. 1095, 1100-1101, U. S. C., Title 48, Sec. 358	<i>passim</i>
Act of May 14, 1898, c. 299, 30 Stat. 409, U. S. C., Title 48, Sec. 371	46, 47, 49
Act of March 3, 1899, c. 424, 30 Stat. 1098, U. S. C., Title 48, Sec. 351	46
Act of May 21, 1900, c. 486, 31 Stat. 180	35
Act of June 6, 1900, c. 786, 31 Stat. 322, U. S. C., Title 48, Sec. 381	46, 47
Act of June 6, 1900, c. 796, 31 Stat. 658, U. S. C., Title 48, Sec. 431	46
Act of June 26, 1906, c. 3547, 34 Stat. 478-480	13, 22
Act of March 2, 1907, c. 2537, 34 Stat. 1232, U. S. C., Title 48, Sec. 365	46
Act of June 25, 1910, c. 421, 36 Stat. 847, as amended by the Act of August 24, 1912, c. 369, 37 Stat. 497, U. S. C., Title 43, Secs. 141-143	41
Act of August 14, 1912, 37 Stat. 512, U. S. C., Title 48, Sec. 23	45, 46, 47
Act of June 6, 1924, c. 272, 43 Stat. 464, as amended June 18, 1926, c. 621, 44 Stat. 752, U. S. C., Title 48, Secs. 221 <i>et seq.</i> (White Act)	<i>passim</i>

III.

THERE IS NO CONFLICT OF DECISIONS

Petitioner refers (pp. 19-21) to several decisions with which the decision below is alleged to be in conflict. Even cursory examination indicates that no such conflict exists.

A. One such assertion has already been dealt with—that the decision conflicts with *Alaska Pacific Fisheries v. United States*, 248 U. S. 78. As we have already noted, that case involved a reservation created by a special statute. The considerations which control the interpretation of such a statute have no relevance to the 1936 Act, a general statute. The language construed is not the same. The two decisions are simply not comparable, and certainly are not in conflict.

B. The next conflict alleged is with *Dow v. Ickes*, 123 F. (2d) 909 (App. D. C. 1941), *certiorari denied* 315 U. S. 807. That case rejected an attempt to require the "opening of new sites or additional general areas for fishing". The claim of conflict is based on the assertion that the two paragraphs of Section 208.23(r) can be read separately: that the first paragraph closes this area to commercial fishing, and that even though Karluk natives (and their permittees) are exempted from the prohibition by the second paragraph, this does not mean that respondents may fish without regard to this prohibition.

The fallacy is that the regulation, of course, must be read as a whole; the substance, not the style or typography, determines its validity. Respondents are not seeking an injunction giving them a right to fish in violation of the White Act. They have secured, rather, an injunction in the terms of that Act—an injunction

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Act of July 3, 1926, 44 Stat. 821, U. S. C., Title 48, Sec. 360	49
Act of April 16, 1934, c. 146, 48 Stat. 595, U. S. C., Title 48, Sec. 232	37
Act of June 18, 1934, c. 576, 48 Stat. 984 (Wheeler-Howard Act)	<i>passim</i>
Act of May 1, 1936, c. 254, 49 Stat. 1230, U. S. C., Title 48, Sec. 358a	<i>passim</i>
H. R. 4826, 68th Cong., 1st Sess. (1924)	22
H. R. 8213, 74th Cong., 1st Sess. (1936)	37
Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, U. S. C., Title 28, Sec. 1254	2
U. S. C., Title 48, Sec. 411	62

LEGISLATIVE DOCUMENTS:

House—

H. Rep. No. 34, 56th Cong., 1st Sess. (1900)	35, 59
H. Rep. No. 357, 68th Cong., 1st Sess., p. 2 (1924)	15
H. Rep. No. 2244, 74th Cong., 2d Sess., pp. 3, 4 (1936)	30, 68, 69, 70
<i>Hearings on H. R. 2714 before the House Committee on Merchant Marine and Fisheries, 68th Cong., 1st Sess., passim (1924)</i>	13
<i>Hearings on H. R. 8213 before the House Committee on Merchant Marine and Fisheries, 74th Cong., 1st Sess., p. 6 (1936)</i>	37

Senate—

S. Rep. No. 1748, 74th Cong., 2d Sess. (1936)	70
S. Rep. No. 1908, 74th Cong., 2d Sess. (1936)	30
S. Rep. No. 733, 78th Cong., 2d Sess., p. 6 (1944)	30, 76
<i>Hearings on S. 2755, 73d Cong., 2d Sess., p. 35 (1935)</i>	72

MISCELLANEOUS:

Alaska Commercial Fisheries General Regulations, Section 208.23(r), Title 50, C. F. R., 11, F. R. 3105, as amended August 27, 1946, 11 F. R. 9528	<i>passim</i>
Regulations for 1946, pp. 64-65	26
<i>Alaska Fisheries and Fuel Industries in 1916</i> , Bur. Fisheries Doc. No. 838, Appendix II to Report of J. S. Commis- sioner of Fisheries for 1916	39
Andrews, C. D., <i>The Story of Alaska</i>	51

restraining petitioner from interfering with their fishing in "waters where fishing is permitted by the Secretary under the regulations". That right is specifically guaranteed them by the Act. *Freeman v. Smith*, 44 F. (2d) 703, 704 (C. C. A. 9th, 1930).

C. The third asserted conflict is with the line of cases, of which *Perkins v. Lukens Steel Co.*, 310 U. S. 113, is an example, to the effect that no action will lie unless a right has been violated. The conflict is wholly illusory, for respondents do claim a right to fish in the area involved. At common law, the public, of which respondents are a part, are entitled to fish in navigable and coastal waters. This right can of course be withdrawn by the state or the United States, but until it is withdrawn—and we may fairly add, validly withdrawn—it is a right. *Shively v. Bowlby*, 152 U. S. 1 (1894); *Canoe Pass Packing Co. v. United States*, 270 F. (2d) 533, 535 (C. C. A. 9th, 1921); *Pacific Steam Whaling Co. v. Alaska Packers Ass'n.*, 138 Cal. 632, 72 Pac. 161, 163 (1903); 22 Am. Jur. (Fish & Fisheries, §§ 10, 11) 673, 674, and authorities there cited.

This common law right, subject to Government revocation, was confirmed by Section 1 of the White Act, which contains the proviso, "Nor shall any citizen of the United States be denied the right to take, prepare, cure, or preserve fish or shellfish in any area of the waters of Alaska where fishing is permitted by the Secretary of Commerce (Interior)." The courts have declared, *Freeman v. Smith*, 44 F. (2d) 703, 704 (C. C. A. 9th, 1930), that the White Act gives a right "guaranteed to every citizen of the United States without reservation * * *." Respondents deny that the Secretary of Interior has validly withdrawn the permission of the Act.

	Page
Baneroft, H. H., <i>History of Alaska, 1730-1885</i> (1935)	57, 58
Bureau of Fisheries Doc. No. 1064, pp. 201, 206 (1929)	26
65 Cong. Rec. 5973-5975 (1924)	16, 23
50 C. F. R. 203.3, 203.6	37
Department of Commerce, <i>Laws and Regulations for Pro- tection of Fisheries of Alaska</i> , Department Circular No. 251:	
10th ed. (June 21, 1924)	25, 26
12th ed. (December 5, 1925)	25, 26
Executive Order No. 405-B. (February 1, 1906)	26
Executive Order No. 1555 (June 19, 1912) (Hydaburg Res- ervation)	22
Executive Order No. 1733 (March 3, 1913)	25
Executive Order No. 2141 (February 27, 1915)	21
Executive Order No. 5000 (November 23, 1928)	25
Executive Order No. 5289 (March 4, 1930)	43
Executive Proclamation No. 2667, 10 F. R. 12303 (1945)	67
Frankfurter, "Some Reflections on the Reading of Stat- utes", 47 Col. L. Rev. 527, 536	67
Johnson, S. P., <i>Alaska Commercial Company, 1868-1940</i>	58, 59
41 L. D. 128	52
12 L. D. 583	48
49 L. D. 592	21
Moser, J. F., <i>Salmon and Salmon Fisheries of Alaska</i> (U. S. Gov't, 1899)	59
Murray, Joseph, <i>Origin and Development of the Alaska Salmon Fisheries</i> , in <i>Seal and Salmon Fisheries and Gen- eral Resources of Alaska</i> (1899), Vol. 2	59
Pomeroy, <i>Equity Jurisprudence</i> , 5th ed., Sec. 399	80
Porter, Robert P., <i>Report on Population and Resources of Alaska at the Eleventh Census—1890</i> (Department of the Interior, G. P. O. 1893) pp. 76, 79	60
Proclamation No. 39 of December 24, 1892, 27 Stat. 1052	25, 48
Public Land Order No. 128 of May 22, 1943, 8 F. R. 8557, <i>passim</i>	
Report of Sec. Int. on H. R. 3859, 8th Cong., 1st Sess. (June H. 1947)	74
Sol. Op. of April 19, 1937 (No. M. 28978)	54, 75
Sol. Op. of September 14, 1937 (No. 31634)	54, 75
<i>Statistical Review of the Alaska Salmon Fisheries</i> , Rich and Ball, Bulletin of U. S. Bureau of Fisheries, Vol. XLVI, Doc. No. 1102, p. 664	57
United States-Canada Halibut Treaty, c. 392, 50 Stat. 325	24

D. Finally, petitioner suggests that the decision below is in conflict with *Williams v. Fanning*, 332 U. S. 490, since the Secretary of the Interior was not joined as a party defendant. On the contrary, the decisions are wholly consistent. In the *Williams* case the Court held that the Postmaster General was not an indispensable party in a suit against the local postmaster to review a fraud order. The Court's opinion points out that in that case the superior official is not a necessary party "if the decree which is entered will effectively grant the relief which is required by expending itself on the subordinate official who is before the court." Such is the situation here.

CONCLUSION

Wherefore, this petition for a writ of certiorari should be denied.

Respectfully submitted,

EDWARD F. MEDLEY,
FRANK L. MECHEM,
W. C. ARNOLD,
Seattle, Washington.
Attorneys for Respondents.

COVINGTON, BURLING, RUBLEE,
ACHESON & SHORB,
Washington, D. C.,
Of Counsel.

March, 1948.

APPENDIX.

THE WHITE ACT, C. 122, 43 STAT. 67, JUNE 6, 1924, AS AMENDED
BY C. 11, 44 STAT. 752, JUNE 18, 1926.

SECTION 1. That for the purpose of protecting and conserving the fisheries of the United States in all waters of Alaska the Secretary of Commerce from time to time may set apart and reserve fishing areas in any of the waters of Alaska over which the United States has jurisdiction, and within such areas may establish closed seasons during which fishing may be limited or prohibited as he may prescribe. Under this authority to limit fishing in any area so set apart and reserved the Secretary may (a) fix the size and character of nets, boats, traps, or other gear and appliances to be used therein; (b) limit the catch of fish to be taken from any area; (c) make such regulations as to time, means, methods, and extent of fishing as he may deem advisable. From and after the creation of any such fishing area and during the time fishing is prohibited therein it shall be unlawful to fish therein or to operate therein any boat, seine, trap, or other gear or apparatus for the purpose of taking fish; and from and after the creation of any such fishing area in which limited fishing is permitted such fishing shall be carried on only during the time, in the manner, to the extent, and in conformity with such rules and regulations as the Secretary prescribes under the authority herein given: *Provided*, That every such regulation made by the Secretary of Commerce shall be of general application within the particular area to which it applies, and that no exclusive or several right of fishery shall be granted therein, nor shall any citizen of the United States be denied the right to take, prepare, cure, or preserve fish or shellfish in any area of the waters of Alaska where fishing is permitted by the Secretary of Commerce. The right herein given to establish fishing areas and to permit limited fishing therein shall not apply to any creek, stream, river, or other bodies of water in which fishing is prohibited by specific provisions of this Act, but the Secretary of Commerce through the creation of such areas and the establishment of closed seasons may further extend the restrictions and limitations imposed upon fishing by specific provisions of this or any other Act of Congress: *Provided further*, That the Secretary of Commerce is hereby authorized to permit the taking of fish or shellfish, for bait purposes

only, at any or all seasons in any or all Alaskan Territorial waters.

It shall be unlawful to import or bring into the Territory of Alaska, for purposes other than personal use and not for sale or barter, salmon from waters outside the jurisdiction of the United States taken during any closed period provided for by this Act or regulations made thereunder.

* * * * *

SEC. 6. Any person, company, corporation, or association violating any provision of this Act or of said Act of Congress approved June 26, 1906, or of any regulation made under the authority of either, shall, upon conviction thereof, be punished by a fine not exceeding \$5,000 or imprisonment for a term of not more than ninety days in the county jail, or by both such fine and imprisonment; and in case of the violation of section 3 of said Act approved June 26, 1906, as amended, there may be imposed a further fine not exceeding \$250 for each day the obstruction therein declared unlawful is maintained. Every boat, seine, net, trap, and every other gear and appliance used or employed in violation of this Act or in violation of said Act approved June 26, 1906, and all fish taken therein or therewith, shall be forfeited to the United States, and shall be seized and sold under the direction of the court in which the forfeiture is declared, at public auction, and the proceeds thereof, after deducting the expenses of sale, shall be disposed of as other fines and forfeitures under the laws relating to Alaska. Proceedings for such forfeiture shall be in rem under the rules of admiralty.

That for the purposes of this Act all employees of the Bureau of Fisheries, designated by the Commissioner of Fisheries, shall be considered as peace officers and shall have the same powers of arrest of persons and seizure of property for any violation of this Act as have United States marshals or their deputies.

SEC. 7. Sections 6 and 13 of said Act of Congress approved June 26, 1906, are hereby repealed. Such repeal, however, shall not affect any act done or any right accrued or any suit or proceeding had or commenced in any civil cause prior to said repeal, but all liabilities under said laws shall continue and may be enforced in the same manner as if committed, and all penalties, forfeitures, or liabilities incurred prior to taking effect hereof, under any law embraced in, changed, modified, or repealed by this Act, may

IN THE
Supreme Court of the United States

OCTOBER TERM, 1948

No. 24

FRANK HYNES, REGIONAL DIRECTOR, FISH AND WILDLIFE
SERVICE, DEPARTMENT OF THE INTERIOR, *Petitioner*,

v.

GRIMES PACKING CO., KADIAK FISHERIES COMPANY,
LIBBY, McNEILL & LIBBY, FRANK McCONAGHY &
CO., INC., PARKS CANNING CO., INC., SAN JUAN
FISHING & PACKING CO., AND UGANIK FISHERIES,
INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS

OPINIONS BELOW

The opinion of the District Court (R. 42-61) is reported at 67 F. Supp. 43. The opinion of the Circuit Court of Appeals (R. 499-514) is reported at 165 F. (2d) 323.

be prosecuted and punished in the same manner and with the same effect as if this Act had not been passed.

SEC. 8. Nothing in this Act contained, nor any powers herein conferred upon the Secretary of Commerce, shall abrogate or curtail the powers granted the Territorial Legislature of Alaska to impose taxes or licenses, nor limit or curtail any powers granted the Territorial Legislature of Alaska by the Act of Congress approved August 24, 1912, "To create a legislative assembly in the Territory of Alaska, to confer legislative power thereon, and for other purposes."

ACT OF MAY 1, 1936, c. 354, 49 STAT. 1350.

* * * sections 1, 5, 7, 8, 15, 17, and 19 of the Act entitled "An Act to conserve and develop Indian lands and resources; to extend to Indians the right to form business and other organizations; to establish a credit system for Indians; to grant certain rights of home rule to Indians; to provide for vocational education for Indians; and for other purposes"; approved June 18, 1934 (48 Stat. 984), shall hereafter apply to the Territory of Alaska: *Provided*, That groups of Indians in Alaska not heretofore recognized as bands or tribes, but having a common bond of occupation, or association, or residence within a well-defined neighborhood, community, or rural district, may organize to adopt constitutions and bylaws and to receive charters of incorporation and Federal loans under sections 16, 17, and 10 of the Act of June 18, 1934 (48 Stat. 984).

SEC. 2. That the Secretary of the Interior is hereby authorized to designate as an Indian reservation any area of land which has been reserved for the use and occupancy of Indians or Eskimos by section 8 of the Act of May 17, 1884 (23 Stat. 26), or by section 14 or section 15 of the Act of March 3, 1891 (26 Stat. 1101), or which has been heretofore reserved under any executive order and placed under the jurisdiction of the Department of the Interior or any bureau thereof, together with additional public lands adjacent thereto, within the Territory of Alaska, or any other public lands which are actually occupied by Indians or Eskimos within said Territory: *Provided*, That the designation by the Secretary of the Interior of any such area of land as a reservation shall be effective only upon its approval by

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on November 21, 1947 (R. 515). The petition for a writ of certiorari was filed on February 20, 1948, and was granted on April 5, 1948 (R. 517). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (U. S. Code, Title 28, Section 1254).

QUESTIONS PRESENTED

Petitioner's "Questions Presented" are not only different in form and substance than those which appeared in his petition (see pp. 49-51, *infra*), but are also somewhat misleading. We should state the questions as follows:

The Secretary of the Interior, having included ocean waters off Karluk, Kodiak Island, Alaska, in an "Indian reservation", has attempted to enforce it by a regulation imposing the penalties and forfeitures of a fishing conservation statute, the White Act, upon anyone who fishes there commercially except Karluk Indians and those to whom those Indians may elect to sell permits. Respondents sought, and obtained from the courts below, an injunction against the Regional Director of the Fish and Wildlife Service, who enforces those penalties and forfeitures. The questions presented are:

1. Whether the regulation establishing an exclusive fishery in designated Indians and their permittees violates the basic prohibition against establishment of an exclusive right of fishery contained in the White Act.
2. If the first question is answered in the negative, then, whether the drastic criminal and forfeiture sanctions of a commercial fishing conservation statute may be used to coerce recognition of an alleged Indian reservation in ocean waters.

the vote, by secret ballot, of a majority of the Indian or Eskimo residents thereof who vote at a special election duly called by the Secretary of the Interior upon thirty days' notice: *Provided, however*, That in each instance the total vote cast shall not be less than 30 per centum of those entitled to vote: *Provided further*, That nothing herein contained shall affect any valid existing claim, location, or entry under the laws of the United States, whether for homestead, mineral, right-of-way, or other purpose whatsoever, or shall affect the rights of any such owner, claimant, locator, or entryman to the full use and enjoyment of the land so occupied.

PUBLIC LAND ORDER 123, MAY 22, 1942, P. 17, 18.

Alaska

MODIFICATIONS OF EXECUTIVE ORDER DESIGNATING LANDS AS INDIAN RESERVATION

By virtue of the Authority contained in the Act of June 25, 1910, c. 421, 36 Stat. 847 as amended by the act of August 24, 1912, c. 369, 37 Stat. 497 (U. S. C., title 43, secs. 141-143), and the act of May 1, 1936, c. 254, 49 Stat. 1250 (U. S. C., title 48, sec. 358a), and pursuant to Executive Order No. 9146 of April 24, 1942: It is ordered, as follows:

1. Executive Order No. 8344 of February 10, 1940, withdrawing Kodiak and other islands, Alaska, for classification and in aid of legislation, is hereby modified to the extent necessary to permit the designation as an Indian reservation of the following-described area:

Beginning at the end of a point of land on the shore of Shelikof Strait on Kodiak Island, said point being about one and one-quarter miles east of Rocky Point and in approximate latitude $57^{\circ} 39' 40''$ N., longitude $154^{\circ} 12' 20''$ W.:

Thence south approximately eight miles to latitude $57^{\circ} 32' 30''$ N.;

Thence west approximately twelve and one-half miles to the confluence of the north shore of Sturgeon River with the east shore of Shelikof Strait;

Thence northeasterly following the easterly shore of Shelikof Strait to the place of beginning, containing approximately 35,200 acres.

2. The area described above and the water adjacent thereto extending 3,000 feet from the shore line at mean

low tide, are hereby designated as an Indian reservation for the use and benefit of the native inhabitants of the native village of Karluk, Alaska, and vicinity:

Provided, That such designation shall be effective only upon its approval by the vote of the Indian and Eskimo residents of the area involved in accordance with section 2 of the act of May 1, 1936, supra; And provided further, That nothing herein contained shall affect any valid existing claim or right under the laws of the United States within the purview of that section.

HAROLD L. ICKES,

May 22, 1943

Secretary of the Interior

(F. R. Doc. 43-9892; Filed June 19, 1943; 10:58 a.m.)

REGULATION 208.23 (OF WHICH SECTION (r) IS PARTICULARLY RELEVANT).

Sec. 208.23 Waters closed to salmon fishing. All commercial fishing for salmon is prohibited as follows:

(a) Portage Bay, tributary to Alitak Bay: All waters of lagoon at head of southeast arm inside or markers placed at entrance, and all waters in the northeast arm within a line from a marker on the north shore 1 statute mile from the stream in the northeast corner of the bay to a marker on the opposite shore.

(b) Deadman Bay, tributary to Alitak Bay: All waters of Deadman Bay within 1 statute mile of the head of the bay.

(c) Western shore of Kodiak Island: All waters within 1 statute mile of the mouth of Red River.

(d) Karluk River: All waters within Karluk River and within 100 yards of its mouth where it breaks through Karluk Spit into Shelikof Strait.

(e) Uyak Bay: All waters of the bay south of 57 degrees 19 minutes north latitude.

(f) Zachar Bay, tributary to Uyak Bay: All waters of Zachar Bay east of 153 degrees 44 minutes west longitude.

(g) Spiridon Bay (or northeast arm of Uyak Bay): All waters of Spiridon Bay south of 57 degrees 37 minutes 6 seconds north latitude.

times and is now Regional Director for Alaska of the Fish and Wildlife Service of the Department of the Interior, with full power to enforce United States Fishery Laws in Alaska (R. 26).

Each respondent is engaged in the taking and canning of salmon in Alaska and each has had a cannery on Kodiak Island for from 7 to 24 years, respectively (R. 27-28). There have been salmon canneries on Kodiak Island, however, since before 1900. The value of respondents' canneries ranges from \$85,000 to \$331,000, and the investment in floating equipment ranges from \$45,000 to \$220,000 (R. 27, 28, 29). Pre-seasonal expenditures for each company ranged in 1946, a typical year, from \$30,000 to \$665,000 (R. 28-29); and each before the opening of the season of 1946 transported from 22 to 247 employees to Alaska (R. 28-29). Each also employed from 45 to 120 fishermen (R. 28-29).

Respondents obtain their salmon from an area contiguous to their canneries including the ocean waters embraced in the purported Karluk reservation as described below (R. 27, 29). There is no available replacement for this source of supply, and without it respondents could not operate their canneries profitably (R. 35).

In May, 1943, Public Land Order 128 (Appendix, *infra*) was signed by the Secretary of the Interior. This Order purported to establish a Karluk Indian Reservation for a vast land-area embracing about fifteen miles of the shore line of Shelikof Strait, and including (Par. 2):

"The area described above and the water adjacent thereto extending 3,000 feet from the shore line at mean low tide. * * *"

(h) East Arm, Ugavik Bay, Kodiak Island: All waters within the arm south of a line extending from Mink Point northeasterly to a point on the northeast shore at 57 degrees 43 minutes 20 seconds north latitude.

(i) Terror Bay: All waters within the bay south of 57 degrees 44 minutes north latitude.

(j) Pasagshak Bay, at entrance to Ugak Bay: All waters within the bay.

(k) Ugak Bay: All waters within the bay west of 152 degrees 49 minutes west longitude.

(l) Kiliuda Bay: All waters of the bay west of 153 degrees 7 minutes west longitude.

(m) Old Harbor, Sitkalidak Strait: All waters within 1 statute mile of the mouth of the stream approximately 1 statute mile northeast of Old Harbor, Sitkalidak Strait.

(n) All bays of Afognak Island: All waters of the bays within lines indicated by markers erected for the purpose.

(o) Kallia Bay, on north shore of Shelikof Strait: All waters within 1 statute mile outside the entrance of the outer lagoon.

(p) Little River, west of Cape Ugat: All waters within 1 statute mile of the mouth of the stream.

(q) Kizhuyak Bay: All waters within one-half mile of the mouth of an unnamed stream entering the bay at approximately 57 degrees 49 minutes north latitude.

(r) All waters within 3,000 feet of the shores of Karluk Reservation (Public Land Order No. 128, May 22, 1943), beginning at a point on the east shore of Shelikof Strait, on Kodiak Island, latitude 57° 32' 30" N., thence northeasterly along said shore to a point 57° 39' 40".

The foregoing prohibition shall not apply to fishing by natives in possession of said reservation, nor to fishing by other persons under authority granted by said natives (49 Stat. 1250). Such authority shall be granted only by or pursuant to ordinance of the Native Village of Karluk, approved by the Secretary of the Interior or his duly authorized representative.

Respondents have at all times insisted that Section 208.23(r) was not authorized by the White Act, because it is patently not a conservation measure and because it plainly violates Section 1 of the White Act, which forbids the granting of any "exclusive or several right of fishery" by granting an exclusive right of fishery to the Karluk Indians and their permittees. They have at all times urged that the drastic penal and seizure provisions of a fishery conservation statute can in no event be employed to enforce an asserted Indian reservation under an entirely different statute.

On the basis of these facts, the District Court found that respondents would suffer a substantial and irreparable loss without an adequate remedy at law if petitioner were to prevent them from fishing in the waters in question (R. 35). Respondents would have to close their Kodiak canneries were their boats, gear and equipment seized (R. 36), and the threat of arrest and imprisonment would have kept their crews out of these waters (R. 36).

On the basis of these Findings of Fact the District Court concluded as a matter of law (R. 39-40) that (1) Public Land Order 128 is invalid insofar as it covers ocean waters; (2) that Section 208.23(r) is null and void; and (3) that a permanent injunction should be granted.

The court below affirmed the decree on November 21, 1947 (R. 515). It held that the Secretary of the Interior was not authorized by Section 2 of the Act of May 12, 1936 to create the reservation in ocean waters below low water mark. The court reviewed the history of non-monopoly policy in Alaskan fisheries; pointed out that the Secretary's action gave 57 adults a complete monopoly (except for such rights as they might sell) in waters which yielded in 1946 almost 4,000,000 sal-

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mon; and concluded that neither on policy nor on language could the authorization to the Secretary in the 1936 Act to withdraw "public lands" for reservations be extended to open ocean waters. Further, the court held that Paragraph 208.23(r) is not otherwise valid as a conservation measure, and was a plain violation of the antimonopoly provisions of the White Act. Finally, it held that the Secretary of the Interior was not a necessary party (R. 499-514).

On February 20, 1948, the petition for a writ of certiorari was filed, and on April 5, 1948, the writ was granted.

SUMMARY OF ARGUMENT

I.

Section 208.23(r), the regulation the validity of which is challenged in this case, is both unauthorized by and in violation of the White Act of 1924. That Act delegated great administrative discretion but limited it in two ways to prevent abuse: that the regulations must be for the *purpose* of conservation and that they must not have the *effect* of creating any exclusive rights of fishery or preventing any citizen from fishing in any area where fishing is permitted. The challenged regulation violates both limitations.

A. The regulation is directly in conflict with the specific prohibitions of Section 1 of the White Act—prohibitions which were of the essence of the Act. This regulation creates an exclusive right of fishery; it denies to citizens of the United States the right to take fish in waters in which fishing is permitted; it is not a regulation of general application. Petitioner's attempts to evade the prohibitions by arguments as to interpretation fail not only on the language of the Act

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

FRANK HYNES, REGIONAL DIRECTOR, FISH AND WILDLIFE
SERVICE, DEPARTMENT OF THE INTERIOR, *Petitioner,*

GRIMES PACKING CO., KADIAK FISHERIES COMPANY,
LIBBY, McNEILL & LIBBY, FRANK McCONAGHY &
CO., INC., PARKS CANNING CO., INC., SAN JUAN
FISHING & PACKING CO., AND UGANIK FISHERIES,
Inc.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS

EDWARD F. MEDLEY,
FRANK L. MECHEM,
W. C. ARNOLD,
Seattle, Washington,

Attorneys for Respondents:

C. VINGTON, BURLING, RUBLE,
ACHESON & SHORB,
Washington, D. C.
Of Counsel.

October, 1948:

but also on both the legislative history and the so-called "administrative interpretation" of the Act. His argument, finally, that the White Act was repealed, *pro tanto*, by a casual technical amendment of the Indian Reorganization Act in 1936 is unsound almost to the point of absurdity.

B. The challenged regulation is also invalid in that it effects no conservation purpose; it neither prohibits nor limits fishing nor does it limit the means of fishing or the quantity of fish caught. It is patently only a device to enforce the alleged Karluk Indian Reservation. *Hale v. Binco Trading Co.*, 306 U. S. 375. Consequently, the drastic conservation sanctions of the White Act may not be incorporated into another statute and used for a wholly different purpose. *L. P. Stewart & Bro. v. Bowles*, 322 U. S. 398.

II.

Not only is the challenged regulation void, but Public Land Order 128 is also void to the extent that it purports to include ocean waters in the Karluk Reservation. Of course, if subsection 208.23(r) is invalid and in conflict with the White Act in any event, the validity *vel non* of the reservation need not be determined. On the other hand, petitioner must necessarily also prove that the reservation itself is valid in order to prevail. For many reasons that proof is impossible.

A. The words "public lands" used in Section 2 of the Act of May 1, 1936 have never been construed to include ocean waters and cannot be so construed here. Petitioner fails to show that the uniform construction of the words "public lands" should be modified in a statute dealing with Alaska.

B: The attempt by petitioner to claim that the ocean waters are an "area of land" within the meaning of the Acts of 1884 and 1891 referred to in the 1936 Act was not raised in the petition for certiorari or in the court below. It is not open here. Moreover, the language of the 1884 and 1891 Acts show that they could not possibly apply to ocean waters; they preserve rights to lands in Alaska "actually occupied" and contemplate ultimate acquisition of title, neither being applicable to ocean waters. Finally, the evidence relied upon by petitioner to demonstrate "actual occupation" is misleading and inaccurate; in fact the waters at Karluk here involved have been common fishing grounds for Russians, Americans and natives of other tribes in Alaska as well as natives of Karluk for almost a century and a half. Indeed, we believe that in the context of the 1936 Act the Secretary would not have authority over ocean waters and Indian reservations even if the language had been "lands" rather than "public lands". *Shively v. Bowlby*, 152 U. S. 1; *United States v. Holt State Bank*, 270 U. S. 49. The language of the 1936 Act and its legislative history distinguish it from *Alaska Pacific Fisheries v. United States*, 248 U. S. 78, upon which petitioner principally relies.

III.

Petitioner's arguments that the District Court lacked jurisdiction are unsound. *Williams v. Fanning*, 332 U. S. 490, has made clear that the Secretary of the Interior is not an indispensable party to this action. Secondly, respondents are clearly entitled to equitable relief. *Ex parte Young*, 209 U. S. 123, 161.

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ARGUMENT

Alaska Fisheries Regulation 208.23(r), the enforcement of which has been enjoined, is one paragraph of comprehensive general regulations for the "protection of Alaska Commercial Fisheries". These Regulations are issued annually, by the Secretary of the Interior, pursuant to the White Act of 1924 (Appendix, *infra*).

The White Act is the organic law for the conservation of Alaska fisheries. Years of agitation preceded its passage, but for a quarter of a century it has been at once a sword and a shield for conservation. It confers on the Secretary the unprecedented power to issue *conservation* regulations, and to insure that conservation will be effected, it makes a violation of the regulations punishable not only by seizure and confiscation of boats, nets, gear and fish, but also by heavy fines and imprisonment. Further to insure conservation, powers of arrest and seizure are given to designated employees of the Fish and Wildlife Service of the Interior Department.

The sword is potent, but the shield, against abuse of this power, is equally great. The White Act does not rely solely on judicial relief from possible abuse of the sweeping power which it had granted; Congress also inserted in the White Act several specific prohibitions and limitations to which all regulations must conform.

Basically, the issue before the Court is whether these limitations, inserted into the White Act as limits on the Secretary's power, can be evaded or ignored.

The first aspect of this basic issue is the attempted avoidance of specific White Act prohibitions. That phase of the issue is: can a White Act regulation ignore the specific statutory prohibition against the creation of monopolies over fishing rights in an area; against the denial to any citizen of the right to fish wherever fish-

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CITATIONS

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ing is permitted (*cf. Freeman v. Smith*, 44 F. (2d) 703, 704 (C. C. A. 9, 1930⁶)); and against regulations not general in character. We say, simply, of course not; the *limitations and prohibitions* of the White Act cannot be ignored and violated as they have been in this case. This is Point IA of our brief.

The second aspect of that basic issue is the attempted use of a *conservation* power to enforce a wholly different statute. Specifically: may a Federal official indirectly make effective the purported creation of an Indian reservation in ocean waters by the use of a regulation issued under the White Act, with its drastic sanctions designed to conserve Alaskan fisheries. We say, simply, that the *conservation* purpose of the White Act cannot be ignored—that a Federal official may not utilize the criminal and forfeiture sanctions of the White Act to enforce an administrative determination made under a completely separate enactment and for a completely different purpose. This is Point IB of our brief.

If either of these aspects of the basic issue is decided in favor of respondents, there is no need to reach the question whether the purported "reservation" in ocean waters is valid. We fully agree with the courts below that it is not, and we believe that on this basis, too, petitioner must fail. This is fully discussed in Point II of our brief.

Before we come to those issues, however, a word is warranted to put this case in proper historical perspective. Since 1943, the Department of the Interior has endeavored to *obtain* for the Karluk natives in Alaska *exclusive* rights to the *commercial* fisheries of an area about 15 miles long and half a mile wide in Shelikof Strait, off Kodiak Island, Alaska. We emphasize the word "obtain"; it is not an effort to "preserve", as

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3. If both prior questions are decided against respondents, then, whether the Act of May 1, 1936, a minor, technical amendment to an earlier statute, granted to the Secretary of the Interior the authority to include ocean waters within the Karluk Reservation.

4. Whether the District Court properly granted the relief prayed.

STATUTES INVOLVED

The relevant portions of the statutes involved (Section 2 of the Act of May 1, 1936, c. 254, 49 Stat. 1250, U. S. C., Title 48, Sec. 358a; and Sections 1, 6, 7 and 8 of the Act of June 6, 1924 (White Act), c. 272, 43 Stat. 464, as amended, U. S. C., Title 48, Secs. 221 *et seq.*); of Public Land Order No. 128 of May 22, 1943 (8 F. R. 8557); and of Section 208.23 of the Alaska Fisheries Regulations (Title 50, C. F. R., 41 F. R. 3105 as amended by 11 F. R. 9528) are set out in the Appendix.

STATEMENT

Petitioner's statement of the case (Br. pp. 5-9) wholly ignores the findings of fact of the District Court. Under well-settled doctrine, those findings, have been approved by the court below, will not be further reviewed here. *United States v. O'Donnell*, 303 U. S. 501, 508. We summarize those findings in this Statement, and, at the appropriate points in the Argument *infra*, we will correct the misleading and frequently completely erroneous statements which the petitioner makes when he goes outside the record.

The District Court found that the seven respondents are corporations or business concerns appropriately qualified to do business in Alaska (R. 24-26). The petitioner, a resident of Juneau, Alaska, was at all relevant

The Order claimed as its foundation Section 2 of the Act of May 1, 1936 (Appendix, *infra*): the native residents of the land area voted their approval on May 23, 1944 (R. 32). This reservation includes the waters described above in which respondents have fished for many years (R. 27, 29). From the creation of the reservation in 1944 respondents have challenged its validity and particularly the attempted inclusion of ocean waters (R. 32).

In 1946, Section 208.23(r) (Appendix, *infra*) of the Alaska Commercial Fisheries General Regulations was issued. This section closed to salmon fishing all the waters of the Karluk Reservation as established under Public Land Order 128 and added the following proviso:

"The foregoing prohibition shall not apply to fishing by natives in possession of said reservation, nor to fishing by other persons under authority granted by said natives (49 Stat. 1250)."

The regulation purports to be based on the White Act of 1924 (Appendix, *infra*), a measure for the conservation of the fisheries of Alaska. Section 6 of the White Act contains enforcement provisions, including seizure of boats, gear and equipment as well as criminal prosecution of violators. Under that Act petitioner has been properly authorized to make those arrests and seizures (R. 33-34).

Since publication of Section 208.23(r) of the Commercial Fisheries Regulations, petitioner has continually threatened, except as restrained by the court below, to seize the fish, boats and gear of respondents utilized in fishing in the Karluk waters (R. 26-27, 34).

The vote (R. 462) was 46 for, 0 against, with 11 eligible voters absent. In all, 57 adult Indians are concerned in the reservation.

petitioner's brief would suggest: At Karluk, for example, *both* Karluks and non-Karluk have fished in the ocean waters now sought to be reserved since before 1800 (see pp. 54-60, *infra*). We emphasize "exclusive"; what was for over a century and a half a fishing area open to all (subject to conservation regulations) is now sought to be made a monopoly area for the Karluks, where they may fish, and may sell others permission to fish, as they see fit. We also emphasize "commercial" fisheries; the case does not involve fishing for food, as petitioner implies. The right of Karluk natives to fish for personal or family use has never been challenged, and continues wholly unrestricted.

In 1943, the Department hit upon a minor, 1936, amendment to the Wheeler-Howard Indian Reorganization Act, as an alleged basis for creating a Karluk Reservation, and including in it not only 35,000 acres of upland, but also this large segment of ocean waters. Some 57 adult Indians and their children were to be given permanent and exclusive proprietorship—to fish, or to sell permission to non-Karluk residents to fish, or both—over an area which yields many million of dollars worth of fish every season.

Respondents, as well as others, immediately challenged the validity of this attempt. For two seasons, no effort was made to enforce the alleged reservation, though some fishermen, to avoid argument, paid their tribute to the Karluk natives by purchasing permits. The proper remedies available to enforce any lawfully created Indian reservation—remedies which had been used by the Government before in a similar situation—were not invoked. *At. Alaska Pacific Fisheries v. United States*, 248 U. S. 78.

Instead the Department, to make this exclusive proprietorship in the Karluks effective, adopted the *in*

terrorem methods of threatening respondents with the conservation sanctions of the White Act. It was that final course of conduct which forced respondents to seek and obtain injunctive relief.

I.

THE CHALLENGED REGULATION IS UNAUTHORIZED AND IN VIOLATION OF THE WHITE ACT.

The need for conservation control of the commercial fisheries of Alaska has been recognized since as early as 1906. In that year, Congress itself specified certain controls by the Act of June 26, 1906 (c. 3547, 34 Stat. 478-480)—that no fishing could be done within 500 yards of the mouth of any salmon stream, and that there should be weekly closings to fishing in certain waters.

During World War I, however, fishing expanded, and depletion was threatened. Several attempts to secure additional legislation failed. Finally, in 1922, the President, acting by Executive Order in the absence of statute, created in the Territorial waters two Fisheries Reservations, and in them gave the Secretary of Commerce power to control commercial fishing by regulation. Such regulations were issued; they closely restricted commercial fishing and in particular limited it to individuals and companies which had previously fished.

When, in 1924, Congress considered the bills which evolved into the White Act, these regulations and their administration were the principal area of controversy. See *Hearings on H. R. 2714 before the House Committee on Merchant Marine and Fisheries*, 68th Cong., 1st Sess., *passim*. It was urged that fishing permits had been issued for purposes unrelated to conservation, that

abuse of power, preferences and favoritism were not unknown, and that many citizens had been excluded from commercial fishing in Alaskan waters.

It was recognized, by 1924, that Congress could not follow the 1906 pattern and provide detailed conservation rules in the statute. A very considerable administrative discretion was necessary for conservation. This was conceded by all. The problem which Congress had to resolve in the White Act was how to provide enough administrative discretion to achieve necessary conservation and at the same time to forestall possible abuse. Debate centered on how, by limiting language, this discretion could be canalized within conservation purposes, and even within these limits controlled to make impossible the creation by regulations of any exclusive or monopolistic position for an individual or group.

» The original bill (H. R. 2714) in 1924 sought simply to sanction and confirm the power exercised by the President's 1922 Executive Order. Fundamentally, the legislative history of the White Act demonstrates that this was *not* the course taken. Rather, Congress granted broad powers, provided many and stringent sanctions, but at the same time enacted explicit limitations on how these powers were to be exercised. The limitations are phrased both in terms of the *purpose*, *i.e.*, conservation, for which regulations may issue, and in terms of the *form and result* to which even conservation regulations must conform. Thus Congress, so far as language and intent can do it, specifically insured that every regulation issued under the White Act would be for conservation purposes, and in addition would be general in its application, would not afford to any individual or group any exclusive fishing rights, and would

not deny to any citizen the right to fish where sound conservation permitted fishing.

The challenged regulation violates every one of these precepts.

A. SECTION 208.20 IS INVALID BECAUSE IT IS IN CLEAR VIOLATION OF THE SPECIFIC LIMITATIONS ENACTED IN SECTION 1 OF THE WHITE ACT.

Section 1 of the White Act requires, *inter alia* —

“that every such regulation made by the Secretary of the Interior shall be of general application within the particular area to which it applies; and that no exclusive or several right of fishery shall be granted therein, nor shall any citizen of the United States be denied the right to take, prepare, cure or preserve fish or shellfish in any area of the waters of Alaska where fishing is permitted by the Secretary of the Interior.”

That language has never been repealed or modified. It is not ambiguous. Yet it is at the heart of the Act, as its legislative history abundantly shows. It is clearly stated in the report of the House Committee (H. Rep. No. 357, 68th Cong., 1st Sess., p. 2):

“At the present time it is the policy of the department as one means of control of fishing to grant a limited number of fishing permits within any designated area and to exclude all others from fishing rights therein. Your committee does not question the purpose of the department in this regard, but it has reached the unanimous and positive opinion that this practice of granting exclusive fishing privileges should cease and in this section it is declared that all regulations authorized to be made shall be of general application and that no exclusive or several right of fisheries shall be granted, nor shall any citizen be denied the right to take fish in waters where fishing is permitted

This declaration of policy and prohibition of law was earnestly urged upon the committee by the Delegate from the Territory, Mr. Sutherland, and has the general support of the people of the Territory.

Senator White of Maine, author of the bill, stated (65 Cong. Rec. 5974):

"The Committee inserted this provision in order to do away with that exclusive right of fishing and to insure to every citizen of the United States equality of right and equality of opportunity."

Measured against these requirements, the challenged regulation cannot stand. Plainly it is not of *general* application. Unless language has lost its meaning, this is a *special* regulation, of *special* application, relating to the Karluk natives. A more deliberate disobedience of the Congressional mandate would, indeed, be difficult to contrive: an area is first completely closed, and then the prohibition is lifted for the Karluk Reservation Indians and those others they may temporarily license for fees or on any other condition they care to impose.

Conversely, the regulation denies to citizens of the United States the right to take fish in waters in which fishing is permitted. The Court of Appeals for the Ninth Circuit, in *Freeman v. Smith*, 44 F. (2d) 703 (1930), interpreted the White Act limitations in language which has been accepted for almost 20 years:

"It will thus be seen that the right to take, prepare, cure, or preserve fish or shellfish in any area of the waters of Alaska, where fishing is permitted by the Secretary of Commerce, is guaranteed to every citizen of the United States without reservation, whether he be a resident of Alaska or not:

Here only Karluk Reservation Indians (and the others they may "authorize") may fish; all others are excluded.

Finally, the regulation necessarily results in the grant of an exclusive right of fishery. Indeed, a more perfect monopoly could not be devised than by a system which permits, in an area otherwise closed, one group alone to fish and to authorize others to fish on their own terms.

But we need not labor the point. Petitioner himself recognizes the necessary conflict with the statute, and devotes a major portion of his brief to numerous and inconsistent theories upon which he may avoid the plain violation of the prohibition. He succeeds only in demonstrating that Congress meant what it said.

1. *The argument on "governmental use"*.—Petitioner's first attempt to evade the White Act prohibitions is by asserting, in effect, that they do not mean what they say. He says (Br. pp. 37-39) that the prohibitions do not apply to the Government, and that since a reservation of "public lands" for Indians is a proper Government act it is a "reservation of lands for governmental use". An analogy is drawn to a military reservation.

The misleading character of the argument is apparent from its mere statement. Petitioner begins by stating (Br. p. 37):

"It was the view of the courts below that the White Act limited any action taken with respect to lands under water in Alaska."

With due deference, that was *not* the view of either lower court. Each held that the White Act limited action *by the Secretary of the Interior with respect to commercial fishing regulations in Alaska* (R. 54-59;

502-506). The courts did not hold, nor do we assert, that the White Act prohibitions prevent action by the President in setting up a naval base (assuming that he has statutory authority to set aside areas of land and water for such purposes). The White Act certainly does not prevent further legislation by Congress. Actually, a few sentences later, petitioner correctly limits the scope of the Act. He says (pp. 37-38):

"If [the White Act] simply directed that in making fishing regulations authorized by the Act, the Secretary of Commerce should not discriminate among individuals."

The inhibition is now, of course, on the Secretary of the Interior, not the Secretary of Commerce, and the prohibited discrimination is among "citizens", but, in general, we agree that such is the scope of the Act. But that prohibited act *is exactly what the Secretary has done here*: he has, in making fishing regulations, permitted one group of citizens to fish, but forbidden others to do so. The regulation we are challenging is a fishing regulation, not a presidential proclamation or an act of Congress.

Nor does petitioner advance his argument by suggesting that the regulation may be sustained because the Secretary has a power and duty with respect to Indian reservations. This, of course, amounts to the assertion that the Secretary of the Interior may use powers given him subject to explicit limitations under one statute, and transplant them, without limitations, to another statute, under which the reservation was attempted to be created. That plainly may not be done, and is indeed a further basic objection to the regulation, which we set out in Point B, *infra*, pp.

We should add here, however, in order that our position be not misunderstood, that we do not deny ~~that~~ there may be overlapping prohibitions. If the United States creates a naval reserve in navigable waters and prohibits entry thereon, the prohibition against entry flows from the statute creating the naval reserve, and whatever sanctions are provided by *that* statute are of course available against the trespasser. But nothing in that situation means that the conservation sanctions of the White Act may be used to enforce the reserve, whether validly or invalidly created.

2: *The argument on legislative history of the White Act.*—The second variant of the argument that the White Act does not mean what it says is the attempt of the petitioner to argue that the legislative history of the White Act shows that "Indian fisheries" are not subject to the explicit limitations on the power of the Secretary to issue regulations (Br. pp. 39-46). We have grave doubts whether even the most explicit legislative history would warrant reading an exception into unqualified language, but we never reach that question.

Petitioner does not argue by adducing anything which says that there is an exception for "Indian fisheries" even remotely, but by inference from a series of facts, or assumed facts, which, separately or in concert, prove nothing of the sort.

Petitioner's argument of "government use" would also seem to suggest that respondents should be viewed as if they were complaining of a discrimination between them, as citizens, and the Government. Patently, that is not the discrimination involved; it is a discrimination between Karluk natives (and their permittees) and all other citizens. The further difficulty that this is not a reservation of "public lands", but of ocean waters, which are vastly different, is dealt within Point II, *infra*.

We have already stated (pp. 13-14) in general the course of the legislative history. The Secretary of Commerce had set up "fishing reservations", from which all except those who secured permits were excluded. Few, except the favored permittees, liked that system. The permits were strictly limited, and were generally given to those who had fished in the "reservation" in prior years. The Alaska residents, Indian and non-Indian alike, and the non-residents of Alaska all joined in protest against a system which deprived them, in effect, of an equal opportunity to engage in commercial fishing. The Indians supported the successful attempt to abolish such special privileges, as petitioner correctly observes (Br. p. 42), but with no suggestion at any time that they sought to abolish one favored class in order themselves to become a favored class. They wanted the "equality" and "non-discrimination" clause so that they would have a chance to compete on equal terms. Petitioner refers to no statement in either the hearings or the committee reports in which it was claimed that the language of Section 1 of the White Act permitted new, Indian, exclusive fishery reservations. We say it advisedly; there is no such statement. The endorsement of the bill by the natives of Alaska does not prove - indeed does not even support an inference - that there was to be an exemption of "Indian fisheries" from the statutory limitation.

Petitioner next refers (Br. p. 40) to the fact that no one at the hearings challenged or protested the Annette Island Reservation, and that this reservation, which included fishing waters, was not abolished. Again, the fact will not support the inference. The Annette Island Reservation was lawfully created by a specific act of Congress, Act of March 3, 1891, Section 15, c. 561, 26 Stat. 1101. The "Metlakatla Indians * * * and such

other Alaskan natives as may join them", as the statute phrased it, were given the exclusive fishing rights there, and all others were excluded, *not* by any regulation under the White Act, but by the provisions of the separate statute creating the reservation. See *Alaska Pacific Fisheries v. United States*, 248 U. S. 78. That Congress did not repeal a prior *statutory* reservation lends no support to the argument that it sanctioned administratively created reservations in the future.

Petitioner also asserts that Congress cannot be taken to have abolished other "native fishery reserves" where the Government had asserted exclusive control over ocean waters on behalf of the natives. The short answer is that there were none such. The Tyonek (or Moquawkie) Reservation, to which petitioner makes reference (Br. p. 40) includes no ocean waters or even tidelands, and makes no reference to Indians or Eskimos, or fishing, much less to any exclusive native rights of fishery. See Executive Order No. 2141, dated February 27, 1915.³ The decision of the Solicitor of the Interior Department to which petitioner refers as showing a lease of cannery and fishing privileges (49 L. D. 592) is not concerned with the scope of the reservation, but only with whether there was a power in the Superintendent of Education to sign a lease. So far as can be inferred from the opinion, the Superintendent was primarily interested in leasing a cannery site; the fishing privileges, if there were any, referred to the Chuit River, which marked one boundary of the reservation. Commercial fishing in rivers, however, had been severely limited by statute since 1906. Act of

³The Order reads simply that the tract of land described "be, and the same is hereby withdrawn from disposal, and reserved for the use of the U. S. Bureau of Education, subject to any existing vested rights."

June 26, 1906, *S.* 3574, 34 Stat. 478. The Hydraburg Reservation, which includes some water area (Exec. Order No. 1555) has never before, so far as respondents are aware, been asserted to be an exclusive fishery area for the Hydras.¹ We should add that nothing in the hearings suggests that Congress had ever heard of either reserve. They form no basis for the inference that Congress intended to have an "except for Indians" clause read into the prohibitions it enacted.

Petitioner next refers (*Br.* pp. 43-45) to the change in the language of the statutory prohibition during the committee consideration of the bill. He quotes (p. 43) a proviso to the statutory limitations in one of the bills (*H. R.* 4826), which stated that, as to the prohibition against exclusive rights of fishery, it "shall not affect any right exercised by the descendants of the aboriginal people of Alaska or those of the half blood who are descendents of the aborigines which were exercised and claimed up to the passage of this Act." This proviso was dropped in the final bill.

If this proves anything, it proves that Indians were *not* to have special treatment. We should add, however, that if this case turned on "aboriginal rights", there would clearly be no basis for including ocean waters off Karluk in a reservation. As we describe in some detail below (pp. 54-60), the waters here in question have been fished by both natives and non-natives of Karluk continuously for over 150 years; indeed they were one of the earliest Russian fisheries in Alaska.

Petitioner, finally, attempts to draw an inference from the undoubted fact that the White Act was not

¹ The Commercial Fishing Regulation have never mentioned any limitation on commercial fishing in these waters, other than the usual conservation rules equally applicable to everyone.

intended to discriminate *against* the Indians, and states (p. 45) that one amendment was rejected on the ground of probably injury to Indians. But it is a far cry from a lack of intention to discriminate against the Indians to an intention to discriminate in their favor. Congress did not reject one exclusive right in favor of another. The amendment to which petitioner refers to bolster his argument is wholly beside the point, and in fact emphasizes the Congressional desire for equality, not preference. The amendment referred to (65 Cong. Rec. 5973-5975) proposed to extend protection only to American citizens who employed American citizens. It was rejected on the statement of Mr. White that "Instead of this right [to fish] being open to every American citizen it will be open to some American citizens and denied to other American citizens because, perchance, of the men he employs to do his work." There is no warrant in the debates for petitioner's suggestion that the amendment had anything to do with Indians; the author of the amendment made it clear that they were American citizens who would not be affected either way. 65 Cong. Rec. 5974.

The sum total of petitioner's legislative history proves nothing. There is some evidence that Congress did *not* intend to permit exclusive rights in commercial fisheries to be created for Indians. Certainly there is nothing which would qualify the text of the act: "nor shall *any* citizen of the United States be denied the right to take, prepare, cure, or preserve fish or shellfish in any area of the waters of Alaska where fishing is permitted."

3. *The argument on administrative interpretations of the White Act.*—The next suggestion which petitioner makes (Br. pp. 46-48) for avoiding the White

Act language is that "administrative interpretation" of the Act has excluded Indian fisheries from its prohibitions. One may well doubt that a positive prohibition may be avoided by "administrative interpretation" in any case, but in fact no such administrative interpretation exists.

The burden of the argument is that the White Act regulations issued by the Department of Commerce "particularly called attention" to four reserves (Annette Island, Aleutian Islands, Afognak and Yes Bay). This is disingenuous. The regulations merely quoted the statute and the Executive Orders as part of "laws relating to the protection of Alaska fisheries", and did not in any way relate these statutes and executive orders to the regulations issued under the White Act. For that matter, the announcements have for years contained the text of the United States-Canada Halibut Treaty and its implementing statute (c. 392, 50 Stat. 325), yet this scarcely throws light on the meaning of the White Act.

Moreover, the argument is based on a plain misstatement of fact. Petitioner refers to the four reserves mentioned in the regulations as reserves "that in terms reserved fishing areas for native use" (Br. p. 47), and states that in the regulations "the attention of all fishermen was called to the prohibitions against non-native fishing in all four of those areas (Br. p. 47, n. 20). The true facts are that *except by special act of Congress* at the Annette Islands, no Indian or Eskimo reservation in Alaska has accorded an exclusive or special right of commercial fishery, and only with respect to the Annette Islands reservation did the regulations call attention to a prohibition against non-native fishing.

The Aleutian Islands Reservation, for example, one of the four to which petitioner refers, was set up by

Executive Order No. 1733 of March 3, 1913. It ordered that all islands of the Aleutian chain "be and the same are hereby reserved and set apart as a preserve and breeding ground for native birds, for the propagation of reindeer and fur bearing animals, and for the encouragement and development of the fisheries." Certain acts were prohibited. *There is no reference in the order to native fisheries.* Indeed, there is no reference to any native use of any sort even as to birds or animals. Petitioner's brief is plainly in error in referring to this order as one which "in terms reserved fishing areas for native use", and equally in error in stating that the regulations, which simply quoted the Executive Order, called attention "to the prohibition against non-native fishing" in that area. The 1924 regulations (Dept. Circ. No. 251, 10th ed.) simply quoted the executive order. Beginning with the regulations issued on December 5, 1925 (*id.*, 12th ed.) conservation regulations have applied generally to the Aleutian Island Reservation. There has never been a reference to any distinction between native and non-native fisheries.

The Afognak Forest and Fish Culture Reserve is another of the reserves to which petitioner refers. Again, it did not grant exclusive fishing rights to Indians; it simply prohibited *all* fishing in the reserve. President Harrison's Proclamation of December 24, 1892 (27 Stat. 1052) creating the Reserve provided that "Warning is hereby expressly given to all persons not to enter upon, or to occupy, the tract or tracts of land or waters reserved by this proclamation, or to fish in or

⁵ The partial revocation of the 1913 Executive Order by Executive Order No. 5000 of November 23, 1928 made no change in this request. It simply removed certain named islands from the reservation.

use any of the waters herein described. The sole exception was that the proclamation was not to deprive any bona fide inhabitant of said island of any valid rights he may possess under the treaty for the cession of the Russian possessions in North America to the United States. * * * *Ibid.* The 1924 White Act regulations, (Dept. Circ. No. 251, 10th ed.) quote the executive order, and in the regulations themselves state that they are inapplicable to the Afognak area. The fish hatchery was abandoned in the late 1920's, however, and beginning with the 1929 White Act regulations, the Afognak waters have simply been subject to the general commercial fisheries conservation regulations. See Br. Fisheries Doc. No. 1064, pp. 201, 206 (1929). Certainly no "administrative interpretations" can be gleaned from a reserve in which *all* were forbidden to fish until 1929, and *all* were permitted equal fishing rights thereafter.

The last of the four reservations—Yes Bay—created as a salmon hatchery by Executive Order No. 405-B on February 4, 1906, is similar to Afognak, in that it closed the area to *all* commercial fishing. The language of the order quoted by petitioner (Br. p. 47, n. 20) permitting native residents "to take fish from the waters, and fuel from the forests" has obvious reference to food and fuel for personal use, not to commercial fish-

We do not disagree with petitioner's suggestion, elsewhere made in his brief (p. 57) that the White Act may properly be applied to an Indian reservation. Certainly it may for conservation purposes by a regulation of general application. The 1946 regulations apply to the Annette Island Reservation, without exception. Regulations for 1946, pp. 64-65. So, one may assume, did the Volstead Act. Dual prohibitions by separate statutes are frequent, but this does not prove that the seizure provisions of the White Act could be used to enforce compliance with regulations concerning the taxing and sale of alcoholic beverages.

ing. The White Act regulations themselves have specifically forbidden *all* commercial fishing in that area since 1925. (Dept. Circ. No. 251, 12th ed., p. 21). Since 1937 the regulations have not even quoted the Yes Bay executive order.

One other related matter may also warrant a brief comment at this point. In an effort to show that the new system of regulation will not do exactly what the White Act forbids, petitioner tries to convey the impression throughout his brief that the Indians *as consumers* are to be the beneficiaries of the new order at Karluk. Thus the brief refers to "the importance of fishing to the Alaska Indians" (p. 26); to the "necessities of life" (p. 38); to "food supply of the Indians" (p. 42); and we are even reminded discreetly of starving Indians and workdogs (p. 41). In short, the impression is conveyed that the Indians are either going to eat the salmon caught at Karluk or get direct consumer benefit from them.

The argument is very nearly grotesque. This record shows that there are 57 Indian "voting residents" (adults) of Karluk (R. 462); and if they with their families did nothing all year but eat salmon, they would scarcely make a dent in the Karluk catch. Respond-

Petitioner refers also (Br. pp. 48-49) to a reserve at Amaknak Island, and to three reserves created after the one at Karluk, as evidence of administrative interpretation. The three created in 1943, after the Karluk Reservation was challenged, obviously add nothing. But an even more conclusive answer is that in none of the four areas were any commercial fishing waters involved. Amaknak is on the same island with and near Dutch Harbor, and has some value in that the upland area is useful as a shore station for the preservation of herring, and it is to this that the order was no doubt intended to apply. The White Act regulations relating to Alaska fishing have never referred to any limits on commercial fishing at Amaknak, which is a fair indication that none have ever existed.

ents used 638 cannery workers and 459 fishermen in 1946 at Kodiak (R. 28-29), almost 20 times the number of Karluk adults. Respondents have invested \$885,000 in floating equipment which the Karluks would have to duplicate before they could manage the Kodiak catch. Most of the Karluk adults already work for respondents or other cannery operators or fishermen (R. 309). As the court below stated (R. 505):

"There is no evidence that the catch of the white fishermen in the waters sought to be reserved for the Indians in any way lessened the catch of the fifty Indian families or the wages they earned. It is fair to assume that since six hundred odd white fishermen used these waters without interfering with each other, the 57 Indian fishermen would find no greater interference. Indeed, so far as their purchasing power is concerned, it well may be that it was much higher than before the white men established their plants on Kodiak Island.

The plain truth is that the regulation will not result in a single Indian—or his dog—eating even one more salmon than he would have if the regulation had not been issued. Indeed, there is not a word in the Record in this case, as distinguished from petitioner's brief, to indicate that there is any shortage of salmon for Indian use or that respondents are interfering with a full Indian catch. So far as we know, no statute or regulation restricts the Indian from catching fish in these waters at any time for his personal or family use.

What is here concerned are the commercial fisheries of Alaska. What is sought is restrictive and selective licensing—at a price which, in substance, is a tax unauthorized by either Congress or the Territorial legislature. The petitioner concedes in his brief that the Karluk Indians are going to restrict the number of licenses (Br. p. 65). The record shows that this is con-

templated (R. 128). Indeed, unless someone is excluded, the belatedly suggested conservation purpose would not even theoretically be served.

In short, in 1922 the Government began a permit system without statutory sanction. By 1924 Congress, reflecting the widespread dissatisfaction with the device, forbade it by the flat prohibitions of Section 1 of the White Act. Now it is proposed to recreate the old permit system, with but two differences: (a) under the new program, the permittee must pay a tax to the Indians and meet their other conditions to get the permit, which was not required under the old system; and (b) under the new program, permits are granted and are revocable on the signature of a Karluk Indian, rather than the Secretary.

We do not believe that the permit system 1947 style, would have pleased Congress any more than the 1922-1923 model. Whether it might or not, all exclusive rights were specifically prohibited by the White Act. The "exclusive rights" permit system cannot, by changes of detail, be legally resurrected after its careful, considered, and unqualified Congressional interment in 1924.

4. *The argument as to repeal by implication.*—Finally, as a last resort, petitioner seeks to escape the conflict between the equality mandate of the White Act and subsection (r) by arguing that it has been *pro tanto* repealed by the Act of May 1, 1936 (c. 254, 49 Stat. 1250) under which the purported Karluk Reservation was set up. This argument (Br. pp. 47-50) is generously stated (pp. 49-50): "The only part of the White Act that would fall * * * is the equality provision."

The patent absurdity of this argument is more fully dealt with in Point II, *infra*. Suffice it to say here

that the 1936 Act was a technical amendment to the Wheeler-Howard Indian Reorganization Act of 1934 designed to correct an omission in the original Act; it was treated solely as an Indian matter; it was passed with no hearings or discussion, and it makes no mention whatever of waters or fisheries. Not a word concerning fisheries or waters appears in the brief Congressional consideration of this minor amendment. It is difficult to accept seriously the suggestion that the 1936 Act could under those circumstances be urged as an implied repeal of the fundamental and important limitation on the Secretary's White Act power in that organic fisheries act for Alaska. See pp. 67-74, *infra*.

Moreover, though urged as a last resort on the present appeal, the argument has been tried, and has failed, once before. In 1944 Congress, in connection with a proposed revision of the White Act, was requested by the Department of Interior to condition the equality clause by making it "subject to the provisions of * * * the Act of May 1, 1936, and to other applicable laws". The request was specifically rejected by the Senate Committee on Commerce, which stated (S. Rep. No. 733, 78th Cong., 2d Sess., p. 6):

"In its second and latest series of proposed amendments, however, the Department asked that this existing language of the present law be changed so as to make it 'subject to the provisions of * * * the act of May 1, 1936 (49 Stat. 1250, c.

The House Committee on Indian Affairs, to which the bill was referred, noted that no objections to the bill were "entertained by any of the other Indians or Eskimos of Alaska so far as known to the Committee." H. Rep. No. 2244, 74th Cong., 2d Sess., p. 3. No one, it is clear, thought that fisheries, or fishing interests, were involved. The Senate Committee on Indian Affairs simply adopted the House Report. S. Rep. No. 1908.

254), and other applicable laws." What is meant by "other applicable laws" is unknown. The 1936 act referred to appears to be the amendment of that year to the Wheeler-Howard Indian Reorganization Act. This 1936 amendment to the Wheeler-Howard law was enacted, without any recorded hearings, in the Seventy-fourth Congress, in response to a request of the Secretary of the Interior that Congress correct an oversight in the original Wheeler-Howard Act which had omitted to authorize the Secretary to issue charters of incorporation to groups of Alaskan Indians. The 1936 amendment also authorized the designation of certain Indian lands in Alaska as reservations.

"The committee does not deem it appropriate to deal with Indian questions in the present bill which relates to the conservation of the Alaskan fisheries. For this reason, it recommends the deletion of the reference to aboriginal rights in the bill as introduced, and the reenactment without change of the language of the existing law. For the same reason, the committee feels that it cannot recommend a congressional endorsement of the Department's suggestion that the act of May 1, 1936, qualified the prohibition in the White Act against the creation of exclusive fishery rights. *Since neither the White Act nor the subject of Alaskan waters or fisheries were at any time mentioned during the consideration of the 1936 Act, to which the Department now refers, the committee feels that it should not in this casual fashion be asked to confirm a suggested implied repeal of an earlier law.*" (Italics supplied.)

The statement by the Committee which was responsible for the White Act, and which was considering its modification, is of course entitled to respect. *Sinai Tribe v. United States*, 316 U. S. 317, 329.

B. SECTION 208.23 (c) IS INVALID BECAUSE IT IS NOT A CONSERVATION MEASURE.

The objection to the challenged regulation does not stop with the fact that it is squarely in the teeth of the specific prohibitions of the White Act. In addition, we believe the regulation must fall because it is plainly *not* a *conservation* regulation, but simply an *in terrorem* means of compelling recognition of an alleged Indian reservation.

The regulation purports, of course, to be issued under the authority conferred by the White Act. There is no ambiguity about the *conservation* purpose of that enactment. The first words of the first sentence are "That for the purpose of protecting and conserving the fisheries of the United States in all waters of Alaska" the Secretary may issue regulations. Nor is there ambiguity in the context of the law: conservation alone is to control the Secretary's action. By his regulations he may set apart fishing areas and establish closed seasons and prohibit or limit fishing. He may limit the total catch in any area. He may control the time, means, methods and extent of fishing. He may permit the taking of fish for bait at any time. He may discriminate between types of gear in particular areas. He may not, as we have already pointed out, discriminate as among citizens.

This is *conservation* language, exemplifying the purpose of the statute. It has nothing to do with Indian reservations. Congress delegated its legislative powers

over the Alaskan commercial fisheries, and authorized administrative action to be taken, because it wanted to *conserve the fisheries*, not, emphatically, because it wanted to give the Secretary powers to achieve any collateral purpose which he might deem desirable. Congress authorized the drastic sanctions which are contained in the Act—fines, forfeitures, immediate seizure of gear and catch, and imprisonment—because it saw the need for timely protection of the annual runs of fish, not so that the threat of such penalties could be used to achieve other purposes than conservation of the fish.

Thus, without more, subsection 208.23(r) is fatally defective, because it is not a conservation regulation. Section 208.23 of the Regulations (Appendix *infra*) deals with the Kodiak Island area, and specifies, in subsections (a) through (q) the waters closed to salmon fishing. Subsection (r) begins by including in the closed area all waters adjacent to the Karluk Indian Reservation and within 3,000 feet thereof. *But*, it goes on to say (the statutory reference is to an Indian reservation statute), that—

“The foregoing prohibition shall not apply to fishing by natives in possession of said reservation, nor to fishing by other persons under authority granted by said natives. (49 Stat. 1250).”

The most striking thing about subsection (r) is that it does not even fit under the title of Section 208.23, “Waters closed to salmon fishing.” There is no closing, nor any limitation on fishing, or total catch, or

² After suit was filed, the regulation was amended (11 F. R. 9528) by adding: “Such authority shall be granted only by or pursuant to ordinance of the Native Village of Karluk, approved by the Secretary of the Interior or his duly authorized representative.”

gear—in short, no conservation in it at all. It is no more, in effect, than a designation of who may fish, and a sub-delegation of authority as to who shall decide who else may fish.¹⁰ All natives on the reservation—some 50-odd adults, men and women—are specifically permitted to fish in this area; all persons to whom the natives give “authority” to fish—subject to whatever conditions the Indians may impose by way of fees or otherwise—may also fish in the area. What the subsection does is no more than to grant an exclusive monopoly position to the Karluk Indians. It is not related to vessels, gear or catch. It neither prohibits nor limits fishing. Whether fish are or are not to be caught in these ocean waters, and by whom, is dependent upon authorization of the Karluks. The belated effort to dress up the regulation by taking back veto power on the Karluk village ordinances merely confirms the point that the regulation is not for the purpose of conservation, but for the protection of alleged Indian reservation rights.

By no stretch of administrative imagination can this be deemed conservation. And, until the briefs in the court below, no one had the temerity to suggest that it was anything other than an attempt to enforce the purported Indian reservation. Even assuming that one must blind himself to the facts—that there was first an unsuccessful attempt to exact a toll and impose

¹⁰ It should be noted that the veto power (fn. 9, *supra*) does not, to any substantial degree, modify the sub-delegation. If the Karluk natives choose to issue no permits, the Secretary is powerless. If they chose to charge \$5,000 each for permits, the Secretary may veto, but if the Karluk natives stand firm again no permits issue. The same is true if the Karluk natives choose to issue permits only to one company, or only to Roman Catholics, or only to other Indians or Eskimos.

conditions on fishing by all but Karluk Indians on the theory that there was a valid Indian reservation under the 1936 reservation act, and only when that failed was there an attempt to use White Act sanctions to achieve the same result—this belated conservation argument falls.

The argument proceeds on the theory that (p. 62)—

“A year-round resident of a community which depends for its livelihood on the salmon of a given river is more likely not to catch or permit to be caught the marginal salmon needed for perpetuation of the run than an itinerant outsider.”¹¹

State laws denying or qualifying fishing opportunities to non-residents are cited.

One hardly needs to point out that there is nothing in the regulation which makes it turn on residents and non-residents. Anyone may be “authorized” by the Village of Karluk to fish. We need not rely on the

¹¹ Although name-calling does not warrant an elaborate answer, we may direct the attention of the Court to the Findings that these “itinerant outsiders” had fished these waters for periods up to 24 years, had investments totaling \$886,000 in floating equipment and \$1,189,000 in plant, and had spent about \$1,500,000 in preparation for fishing operations (R. 29). One “itinerant outsider” has been fishing at Karluk since 1886, and fishing by non-natives of Karluk goes back of 1800. See pp. 55-56, 58-60, *infra*. Land grants to canneries at this point were confirmed by special act of Congress (May 21, 1900, c. 486, 31 Stat. 180), the Congressional Committee noting even then that “an expensive salmon fish hatchery [was] maintained by these parties in the Karluk River.” H. Rep. No. 34, 56th Cong., 1st Sess. (1900). It is patently absurd to suggest, even by way of assumption, that those whose continued existence depends on maintenance of the fisheries are less interested in conservation than those given the right to collect a fee from others who fish.

obvious inconsistency between petitioner's insistence (Br. p. 9) that some of respondents' non-resident fishermen paid their fees and were given permits, and his argument that the regulation is really "conservation" because non-residents are excluded. Nor need we emphasize that the White Act directs the administrative officials themselves to determine conservation rules, and the time, means and extent of fishing. One will search the Act in vain for any warrant for the sub-delegation of authority to make such determinations, particularly when they are asserted to rest on matters of Karluks against non-Karluk, or residents against non-residents.¹² Cf. *Toomer v. Witsell*, 334 U. S. 385.

But an even closer answer to the contention is that discrimination between Karluk and non-Karluk, or between Alaskan residents and non-residents, is *primarily what the White Act forbids*. Indeed, the claim that such factors had entered into the "conservation" activities of the Secretary was the very reason why the White Act was passed, and why the prohibitions were inserted in Section 1. In words capable of no misunderstanding, the Secretary is enjoined against issuing any regulation which denies to "*any citizen of the United States*" the right to fish where others are per-

¹² One may also note that whereas conservation rules issued by the Secretary are published in the Federal Register, the terms and conditions under which the Village of Karluk will permit non-Indians to fish are not so published. Moreover, the so-called Karluk permits (R. 466 *et seq.*), which petitioner insists should have been admitted into evidence (R. 74-85) show that they are revocable "in the discretion of the issuing officer"—the Indian "President" of the Village (R. 466). Perhaps it is not unfair to question his authority as a conservationist, but in any event, this is sub-delegation which must in itself defeat the regulation. This is delegation running riot." Cardozo, J., in *Schechter Corp. v. United States*, 295 U. S. 495, 553. See also *fta. 9, supra*.

mitted by that regulation to fish. This right "is guaranteed to every citizen of the United States without reservation, whether he be a resident of Alaska or not." *Freeman v. Smith*, 44 F. (2d) 703; (C. C. A. 9, 1930).¹³ Thus petitioner's suggestion in attempted support of his belated conservation argument leads necessarily to saying that the regulation violates the plain prohibitions of the Act. Perhaps not even petitioner would venture to argue that administrative officials could "conserve" the Alaskan fisheries under the White Act by granting fishing permits only to Alaskan residents. Yet that is precisely what his present argument really is.¹⁴

¹³ In *Dow v. Leakes*, 123 F. (2d) 909 (App. D. C. 1941), *certiorari denied*, 315 U. S. 807, the court sustained the regulations of the Secretary requiring fixed fishing gear, such as fish traps, to be a certain distance apart. The court's statement (p. 916) that the White Act did not guarantee "equality in the absolute sense" was only with reference to the fact that two traps could not, in the nature of things, occupy the same space at the same time.

¹⁴ If "conservation" under the White Act can support a regulation permitting residents to fish and excluding non-residents, it seems strange that Congress considered at length in 1936 and rejected a bill limiting seine fishing in Alaska to Territorial residents. See H. R. 8213, 74th Cong., 1st Sess. Not only did the bill imply that legislation would be necessary to accomplish the result, but the then Commissioner of Fisheries filed with Congress a memorandum approved by the Secretary of Commerce stating that the proposal was "diametrically opposed to section 1 of the Act of June 6, 1924" (the White Act). Hearings before the House Committee on Merchant Marine and Fisheries, p. 6.

The one instance in the White Act regulations in which there is a discrimination based on residence (50 C. F. R. secs. 203.3, 202.6; see Pet. Br. p. 59) is one specifically required by a statute enacted in 1934. Act of April 16, 1934, c. 146; 48 Stat. 595, U. S. C., Title 48, Sec. 232.

That a regulation for a feigned and unauthorized purpose must fall is not open to doubt. Indeed, courts have, on occasion, gone behind even stated legislative purposes. *Hale v. Binco Trading Co.*, 306 U. S. 375; *Best & Co. v. Maxwell*, 311 U. S. 454; *Foster-Fountain Packing Co. v. Haydel*, 278 U. S. 1, 10. We scarcely need add that the Secretary is without power to utilize the White Act conservation sanctions to enforce an Indian reservation created—improperly, as we show in Point II, *infra*—under another statute. That simply may not be done. In *L. P. Stewart & Bro. v. Bowles*, 322 U. S. 398, this Court said (p. 404):

“We agree that it is for Congress to prescribe the penalties for the laws which it writes. It would transcend both the judicial and the administrative function to make additions to those which Congress has placed behind a statute.”

Or, as Mr. Justice Brandeis said in *Iselin v. United States*, 270 U. S. 245, 251: “To supply omissions transcends the judicial function.” Had Congress wished to punish trespass on an Indian reservation by sanctions of forfeiture, fines and imprisonment, it would have said so. It has not. Petitioner, with complete candor, states (Br. p. 57): “There is no penal statute enforceable against trespassers) on Indian reservations in Alaska.” The Secretary may not enact that penal statute on Congress’ behalf, and by the same token, petitioner may not threaten such sanctions against respondents to aid in enforcement of a regulation which has nothing to do with the conservation purpose of the White Act. Accordingly, Section 208.23(r) is invalid on its face because it is obviously not a conservation measure authorized under the Act.

* * * * *

One can only conclude, from the sheer number of suggestions which petitioner puts forward in his attempt to by-pass the White Act, that he is seeking to build an impression of strength from a multitude of weaknesses. The challenged regulation is not conservation, and, until this case was in the appellate courts, no one suggested that it was. That alone would dispose of it. But in addition, it flies in the teeth of specific White Act prohibitions. No matter how petitioner attempts to turn and twist the arguments, the consequence cannot be escaped—subsection (r) is in violation of the White Act, and was properly enjoined on that ground.

II

THE ACT OF MAY 1, 1936, DID NOT AUTHORIZE THE INCLUSION OF OCEAN WATERS IN THE KARLUK RESERVATION.

The essential issue in this case is, of course, whether the District Court properly enjoined the enforcement of the White Act sanctions against the respondents. Hence, on some possible theories of the case, the validity *vel non* of the purported inclusion of tidelands and ocean waters in the Karluk Reservation is irrelevant. If, as we have urged in Point I, *supra*, the White Act, denies absolutely to petitioner the right to apply to this area in this fashion the penalties of that Act, then the Act of 1936 and the Land Orders issued under it cannot cure the deficiency.

Yet the issue of the validity of the inclusion of ocean waters within the Karluk Reservation is argued at length by the petitioner, and it intrudes repeatedly and on some theories necessarily into the discussion. Petitioner would utilize the 1936 Act for the purpose of avoiding the positive prohibitions of the White Act.

arguing that, as to a valid Indian reservation, either that the White Act does not apply, or that it has been repealed by implication by the 1936 Act. We have answered the contentions, from the point of view of the White Act, in Point I; here we deny the premise of the arguments: that the reservation of ocean waters is valid. Both of petitioner's positions fall, and his argument falls altogether, if an ocean water reservation is invalid.

Respondents are of course anxious that the issue as to the validity of the reservation of ocean waters be determined, and a long controversy set to rest. In the interest of clarity, however, we should note the following:

(a) A decision by the Court, with respondents, that the White Act prohibitions prevent the grant of an exclusive fishing privilege, reservation or no reservation, makes the validity of the reservation immaterial.

(b) A decision by the Court, with respondents, that the White Act sanctions can be invoked only in the interest of conservation and that the challenged regulation is an Indian relief measure rather than a conservation order, makes the validity of the reservation immaterial.

(c) If, however, the Court should hold, with petitioner, that the White Act prohibitions are inapplicable, for any reason, in Indian reservations, then the question necessarily arises whether there is a valid reservation of the ocean waters.

In sum, the Court can hold *for* respondents on two theories under either of which the validity of the reservation is not reached. It can *hold* against respondents

only by deciding the basic points against them and also deciding that the reservation itself is valid.

Public Land Order No. 128 (Appendix *infra*) provides that the Karluk Indian Reservation, which it creates, shall include not only the land bordering on Shelikof Strait, but also—

“the water adjacent thereto extending 3,000 feet from the shore line at mean low tide.”

The claimed statutory authority for the Order is the Act of May 1, 1936 (c. 254, 49 Stat. 1250), and it is upon that statute that petitioner relies in his brief in this Court.^{14a} We believe that this attempt to create a reservation in the ocean must fail, because of the complete absence of any statutory authority on which it can rest, and that the court below, which so held, should be affirmed.

Section 2 of the Act of May 1, 1936, upon which petitioner relies for authority to include ocean waters in the Karluk Indian Reservation is, in its relevant parts, as follows:

“That the Secretary of the Interior is hereby authorized to designate as an Indian reservation any area of land which has been reserved for the use and occupancy of Indians or Eskimos by section 8 of the Act of May 17, 1884 (23 Stat. 26), or by section 14 or section 15 of the Act of March 3, 1891 (26 Stat. 1101); or which has been heretofore

^{14a} Public Land Order 128 is also based on two other statutes, the act of June 25, 1910, c. 421, 36 Stat. 847, as amended by the act of August 24, 1912, c. 369, 37 Stat. 497 (U. S. C., title 43, sec. 141-143) but these statutes are relevant, if at all, only to the upland area. Neither statute is referred to in Petitioner's brief.

reserved under any executive order and placed under the jurisdiction of the Department of the Interior or any bureau thereof, *together with additional public lands adjacent thereto*, within the Territory of Alaska, or *any other public lands* which are actually occupied by Indians or Eskimos within said Territory: *Provided*, That the designation by the Secretary of the Interior of *any such area of land* as a reservation shall be effective only upon its approval by the vote, by secret ballot, of a majority of the Indian or Eskimo residents thereof.

* * * *Provided further*, That nothing herein contained shall affect any valid existing claim, location, or entry under the laws of the United States, whether for homestead, mineral, right-of-way, or other purpose whatsoever, * * * (Italics supplied.)

Simple analysis of the statute, as indicated in the opinion below (R. 501-502), reveals that there are four separate categories of land which the Secretary is authorized to designate as an Indian reservation:

- (a) "any *area of land* which has been reserved for the use and occupancy of Indians or Eskimos by Section 8 of the Act of May 17, 1884," or
- (b) "any *area of land* which has been reserved for the use and occupancy of Indians or Eskimos by * * * section 14 or by section 15 of the Act of March 3, 1891,"
- (c) "any *area of land* * * * which has heretofore been reserved under any executive order and placed under the jurisdiction of the Department of the Interior or any bureau thereof,"

The section, in other words, is simply a reservation from sale and homestead entry; it could have no application to ocean waters, which of course were not subject to entry and sale. *Shively v. Bowlby*; *Mann v. Tacoma Land Co.*, *supra*. Moreover, as we have pointed out above (p. 48) the regulations which the Secretary of the Interior issued under the 1891 Act specifically excluded not only ocean waters, but also tidelands from the scope of the act. Finally, it does not appear likely that ocean waters are susceptible of "actual occupation", which obviously connotes residence and not use.²¹

3. THE FACTS WITH RESPECT TO THE FISHING IN OCEAN WATERS AT KARLUK DO NOT PERMIT THE APPLICATION OF THE 1884 AND 1891 ACTS, NO MATTER HOW THEIR LANGUAGE IS CONSTRUED.

We have discussed the language of the 1884 and 1891 Acts because we believe that, on their face, they may be seen to be no authority whatever for including ocean waters in an Indian reservation. But we can, and we believe we should, add the additional answer which is supplied by the facts. No matter how the 1884 and 1891 Acts may be construed, ocean waters at Karluk cannot qualify. Each of the acts speaks of rights as of the date when it was passed, not rights to be acquired in the future. Rights under the 1884 Act, for example, depend on a showing of actual occupation in 1884, plus a chain of title since then by consanguinity or a recognized mode of conveyance. *Miller v. United States*, 159 F. (2d) 997 (C. C. A. 9, 1947). The record and historical sources both show that ocean waters at Karluk could

²¹ Such, for example, has been the construction placed upon the phrase, as used in the 1936 Act, by the Solicitor of the Department of the Interior, Sol. Ops. of April 19, 1937 (No. M. 28978), and of September 14, 1937 (No. 31634).

- (d) "together with additional *public lands* adjacent thereto, within the Territory of Alaska, or any other *public lands* which are actually occupied by Indians or Eskimos within said Territory."

Petitioner, in his present brief, has radically changed his view of the category in which the ocean waters are supposed to fall. As noted by the court below (R. 502), he did not contend below that categories (a), (b) or (c) had any application whatever. His argument there was that a 40-acre tract in the village of Karluk had been reserved for a school on March 4, 1930 (Executive Order No. 5289), and that the waters of Shelikof Strait were "public lands adjacent thereto" within category (d). That, indeed, was the argument in the petition for certiorari.¹⁵ Now, however, in an obvious effort to avoid the force of the analysis of the court below with respect to the phrase "public lands" used in category (d), he suggests also that the ocean waters were land "reserved for the use and occupancy of the Indians" under categories (a) and (b).

We think this last-minute argument is of no avail, for a number of reasons. First, however, let us deal with category (d) which, until now, has been assumed to be the statutory foundation upon which the reservation of ocean waters must rest.

¹⁵ Actually, petitioner is in error on the school reservation. The Executive Order of 1930 authorized a reservation of land not in excess of 40 acres to be set aside for a school. In April, 1935, a plat of the school reserve was approved in the General Land Office (Survey No. 2030) showing a reserve of 0.35 acres. Thus the whole Karluk Reservation is alleged to be "public lands" adjacent to what amounts to a large school yard less than half an acre in size. See R. 312.

not possibly be claimed under that act. Petitioner, of course, made no attempt to prove any such right. In fact, the two Karluk natives who testified had lived at Karluk only since 1921 and 1934, respectively (R. 348, 358).

Petitioner's brief makes the truly amazing statement (p. 15), with respect to these ocean waters, that "The natives of Karluk * * * had occupied and used the area in question since time immemorial * * *." The same assertion, or assumption, appears elsewhere in the brief (*e. g.*, pp. 18, 25, 26, 33). Petitioner's argument on the 1884 and 1891 Acts (and indeed on the whole case) appears to be that the native inhabitants of Karluk were in undisputed possession and enjoyed exclusive use and control of the ocean off Karluk and the salmon fisheries therein, from "time immemorial" down to 1938, when respondents first breached their exclusivity, and that the reservation was created by the Secretary of the Interior to preserve or restore the status quo. None of this is supported by the record, and nothing could be further from the fact.

We do not wish to burden the Court with a detailed history of Karluk, and so far as possible we will refer to matters given in full in the Appendix. There is some information, however, in the Record. It shows that non-Karluk fishermen have been extensively engaged in commercial fishing in the area since 1882; during all of that time the Alaska Packers Association, and its predecessors in title, have taken fish in that area with white fishermen (R. 307). During that time, moreover, the Alaska Packers Association has employed most of the native inhabitants of Karluk as company fishermen. The two beach seines which are operated at Karluk are owned by the Alaska Packers Association; the "native beach seines" to which petitioner refers (Br.

A. THE WORDS "PUBLIC LANDS" IN THE 1936 ACT DO NOT
INCLUDE OCEAN WATERS.

Petitioner, in his discussion of the 1936 Act, refers continuously to tidelands, and seeks to give the impression that the issue here is whether tidelands can be included in an Indian reservation. Actually, that issue is not presented in this case, as the court below noted (R. 499, n. 1). The permanent injunction issued by the District Court (R. 41) does not apply to enforcement of the challenged regulation on the tidelands—the area between mean high and mean low water. What is presented, if the Court reaches this Point II, is the validity of a reservation in the open ocean, below mean low tide. We shall refer to some of the tidelands cases, because heretofore, so far as we know, no one has ever even asked the courts to rule that ocean waters are "public lands." We regard ocean waters as *a fortiori* in the tideland cases.

There appears, however, to be agreement that the decisions of this Court are unanimous in holding that the phrase "public lands" does not include ocean waters—or even tidelands, for that matter. Indeed, as the court below pointed out, a decision of this Court less than six months prior to the 1936 amendment had held, in construing a statute relating to the jurisdiction of the Department of the Interior in pre-emption claims, that "the public lands of the United States" did not include ocean tidelands. *Borax Consolidated, Ltd. v. Los Angeles*, 296 U. S. 10. The Court said (296 U. S. at p. 17):

"Specifically, the term 'public lands' did not include tidelands. *Mann v. Tacoma Land Co.*, 153 U. S. 273, 284. 'The words "public lands" are habitually used in our legislation to describe such as are subject to sale or other disposal under gen-

eral laws." *Newhall v. Sanger*, 92 U. S. 761, 763; *Booker v. Harvey*, 181 U. S. 481, 490; *Union Pacific R. Co. v. Harris*, 215 U. S. 386, 388."

Thus, Congress used the phrase "public lands" in the 1936 Act not only in the light of the very recent construction of those words by this Court, but also in the light of a uniform and unvarying construction which had extended over more than half a century. In *Mann v. Tacoma Land Co.*, 153 U. S. 273, tidelands were also claimed under a statute which referred to "unoccupied and unappropriated public lands of the United States." The Court said (153 U. S. at p. 284) that "the term 'public lands' does not include tide lands," and again quoted the language of *Newhall v. Sanger* to which it had referred in the opinion in the *Borax* case set out above. See also *Heckman v. Sutter*, 128 Fed. 393, 394-395 (C. C. A. 9, 1904).

Petitioner, while not denying that "public lands" has always been so construed, asserts that nevertheless in this case Congress used the words intending to include not only tidelands, but also ocean waters, because this is legislation with reference to Alaska (Br. pp. 19-21). Why this fact is significant is not wholly clear, but it appears to be grounded on the assumption (Br. p. 21) that the general land laws of the United States do not apply to Alaska. Not only is the assumption in error, but the evidence with which petitioner attempts to give some substance to the distinction between Alaska and elsewhere is wholly unconvincing.

Petitioner refers (Br. p. 21) to the first Organic Act for Alaska of May 17, 1884 (23 Stat. 26) as authority for his assumption. He neglects to note, however, that in the second Organic Act of August 14, 1912 (37 Stat.

512; U. S. C., Title 48, Sec. 23) Congress expressly provided that—

“The Constitution of the United States, and all the laws thereof which are not locally inapplicable, shall have the same force and effect within said territory as elsewhere in the United States.”

He also neglects to note that even before 1912, Congress had, in a series of laws, specifically extended various provisions of the General Land Laws to Alaska; they are noted in the margin.¹⁶ In other words, the premise on which petitioner bases his argument for construction of the 1936 Act has not been true for almost a quarter of a century.

But, as we have said, not only is the basic assumption in error, but the evidence upon which petitioner relies to give substance to the distinction between Alaska and elsewhere is wholly unconvincing. First, he cites two cases in which courts in Alaskan litigations have used the phrase “public domain” to include both land and water areas. We fail to see what light the use of “public domain” sheds on the meaning of “public lands.” Apart from that, however, there is nothing whatever in the opinions to suggest that the court thought that the terminology was peculiar to Alaska or Alaskan waters. In neither case did Congress use the phrase “public domain.” Actually, in one of the cited cases (*Alaska Gold Recovery Co. v. Northern Mining &*

¹⁶ Act of May 14, 1898, c. 299, 30 Stat. 409, U. S. C., Title 48, Sec. 371 (homestead laws); Act of June 6, 1900, c. 786, 31 Stat. 322, U. S. C., Title 48, Sec. 381 (mining laws); Act of June 6, 1900, c. 796, 31 Stat. 658, U. S. C., Title 48, Sec. 431 (coal land laws); Act of March 3, 1899, c. 424, 30 Stat. 1098, U. S. C., Title 48, Sec. 351 (public land surveys); Act of March 2, 1907, c. 2537, 34 Stat. 1232, U. S. C., Title 48, Sec. 365 (land districts).

Trading Co., 7 Alaska 386 (1928)) the statute with which the court was concerned illustrates that when Congress intends to deal with ocean waters it does not lack for language to express itself; the act stated that "no exclusive permit shall be granted by the Secretary of War authorizing any person or persons, corporation or company to excavate or mine under any of said waters below low tide * * * but citizens * * * shall have the right to dredge and mine for gold or other precious metals in such waters, below low tide * * *." Act of June 6, 1900, Sec. 26, c. 786, 31 Stat. 329; U. S. C., Title 48, Sec. 381. Had Congress intended to permit the extraordinary step of a reservation in ocean waters by the 1936 Act, presumably it would have used somewhat similar language. It did not; it said "public lands." It did not even say "public domain."

Second, petitioner refers (Br. p. 19) to two statutes dealing with Alaska in which, he asserts, the words "public lands" are used in contexts which suggests that in using them Congress meant to include ocean waters. The first is Section 12 of the Act of March 3, 1891 (c. 561, 26 Stat. 1095). We find it difficult to see how this statute, passed almost 50 years ago and before the Organic Act of 1912, *supra*, had extended all laws to Alaska, can be said to be in *pari materia* with the 1936 Act, particularly since Section 12, upon which the argument rests, was repealed only seven years later by the Act of May 14, 1898 (c. 299, 30 Stat. 409).

But even in discussing this 1891 Act petitioner errs in asserting that the context of the act shows that the phrase "public lands" in Section 12 includes ocean waters. The language of the act gives authority to *purchase* certain public lands; petitioner certainly cannot assert that Congress was authorizing the sale to private persons of ocean waters. Moreover, it limited

the right to purchase to persons "in possession of and occupying public lands for the purposes of trade or manufactures"; one could hardly qualify for ocean waters under that. Finally, if there could be any doubt about it, the regulations issued by the Secretary of the Interior under the statute¹⁷ specifically provide (Par. 16): "Where a tract to be surveyed fronts upon tide water, the front or meander line will be run at ordinary high water mark, and the side lines of the tract will terminate at such high water mark, *thus excluding from survey and disposal all lands situated between high and low water marks.*" (Italics ours.) The contemporaneous constructions of "public lands" thus not only excluded ocean waters but even tidelands.¹⁸ The provision in Section 14 cited by petitioner (p. 19), requiring all patents issued under Section 12 to reserve the right of the United States to regulate the taking of salmon, undoubtedly was intended by Congress to permit it to protect the salmon runs in the fresh water streams and on the tidelands regardless of the rights of the abutting owners. The provision has not been inserted in any

¹⁷ 12 L. D. 583, 588 (June 3, 1891).

¹⁸ Petitioner cites Presidential Proclamation 39 dated December 24, 1892 (27 Stat. 1052), which created, pursuant to the 1891 Act, the Afognak Fish Culture Reserve on Afognak Island with waters adjacent thereto, as proof that "public lands" as used in that statute were understood to include ocean waters. In fact, the phrase "public lands" appears in the statute in Section 24, in a context which shows unmistakably that ocean waters were not referred to; it dealt with the creation of forest reservations and referred to "any part of the public lands wholly or in part covered with timber or undergrowth." The Afognak Proclamation was based on Sections 24 and 14, the latter of which specifically authorized the creation of a fish culture reservation at Afognak. The Proclamation, therefore, is not inconsistent with the regulations under the 1891 Act issued by the Secretary.

patent issued by the Land Office since the repeal of the 1891 Act in 1898.

The second statute referred to is the Act of July 3, 1926 (44 Stat. 821, U. S. C., Title 48, Sec. 360), which authorized the leasing of "public lands of the United States in the Territory of Alaska" for fur farming. The only suggestion that a fur farm might be in ocean waters is a proviso that any permit or lease under the statute "shall reserve to the Secretary of the Interior the right to permit the use and occupation of parts of the leased areas for the taking, preparing, manufacturing or storing of fish or fish products". The explanation for the proviso is no doubt the same as for the similar language in the 1891 Act. Moreover, it is scarcely enough to lead to the conclusion that when Congress referred to "public lands * * * suitable for fur farming" it intended to authorize leases of ocean waters. The petitioner refers to no such lease, and we believe that there never has been any.

B. PETITIONER OBTAINS NO SUPPORT FOR HIS POSITION FROM THE 1884 AND 1891 ACTS REFERRED TO IN THE 1936 AMENDMENT.

1. PETITIONER MAY NOT NOW EXPAND THE ISSUES PRESENTED IN HIS PETITION FOR CERTIORARI.

As we have already pointed out, petitioner now for the first time seeks to justify the inclusion of ocean waters in the Karluk Reservation on the ground that they are an "area of land which has been reserved for the use and occupancy of Indians or Eskimos by Section 8 of the Act of May 17, 1884, or by Section 14 or by Section 15 of the Act of March 3, 1891". He attempts thus to present for interpretation the phrase "area of land" rather than "public lands".

That was not an issue presented to the court below, as it points out (R. 502). Nor was it presented to this

Court by the petition for certiorari. In the petition the first question presented was stated to be (p. 2):

"1. Whether the Act of May 1, 1936, authorizing the Secretary of the Interior to set aside 'public lands' in Alaska as Indian reservations * * *"

In the petitioner's brief, however, the first question presented has been modified to read (p. 2):

"1. Whether the Act of May 1, 1936, authorizing the Secretary of the Interior to set aside '*any area of land*' or 'public lands' in Alaska as Indian reservations * * * ." (Italics supplied.)

Under well-settled doctrine, "this Court confines itself to the ground upon which the writ was asked or granted, the review here being no broader than that sought by the petitioner." *Helis v. Ward*, 308 U. S. 365, 370. "Petitioner is not here entitled to decision on any question other than those formally presented by its petition for the writ." *General Talking Pictures Corp. v. Western Electric Co.*, 304 U. S. 175, 179. See also *Alice State Bank v. Houston Pasture Co.*, 247 U. S. 240, 242; *Dickinson Industrial Site, Inc. v. Cowden*, 309 U. S. 382, 389.

The new question, moreover, presents an issue of fact. Petitioner attempts to supplement the Record on this issue by a few references to outside sources. As we point out in some detail below (pp. 54-60), he in fact contradicts the evidence which is in the Record, and draws conclusions which full reference to his outside sources, and others, show to be wholly untenable. We respectfully suggest, however, that this Court should not be required to resolve fact issues neither pleaded, nor presented to, nor decided by, the lower courts.

For obvious reasons, we cannot rely solely on this point. Without in any way indicating that we waive it (if that be possible) or that we regard it as unsound, we proceed to an answer to petitioner's new contentions.

2. THE LANGUAGE OF THE 1884 AND 1891 ACTS SHOWS THAT THEY DO NOT APPLY TO OCEAN WATERS.

Section 8 of the Act of May 17, 1884 (c. 53, 23 Stat. 24, 26; U. S. C., Title 48, Sec. 356) extended to Alaska the laws of the United States relating to mining claims and made Alaska a land district with a United States Land Office at Sitka. A proviso stated—

“That the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress.”

Petitioner, by omitting (Br. p. 15) the italicized words in the proviso, attempts to make it appear to be an Indian statute. It plainly was not; it made no reservation, and recognized no use or occupation or claim, on the part of Indians that it did not also recognize on the part of any other person.

The true character of the 1884 Act is stated in *Young v. Goldstein*, 97 Fed. 303, 307 (D. C. Alaska, 1899):

“The title to all these lands, mineral and non-mineral, remained in the federal government. Those making the improvements had a possessory right or title only to the premises occupied and improved by them. The mineral claimant had no greater or different right or title to the premises occupied by

him than had the non-mineral claimant. This was the condition of land titles in Alaska when a form of civil government was extended to the territory in 1884. Realizing, apparently, the possibility that those who had risked so much in establishing their homes in this then well-nigh unknown country might not reap the fruits of their labor, and for the purpose of protecting them in their property rights, the Congress passed [the Section 8 proviso of the 1884 Act]”.

See also *Worthern Lumber Mills v. Alaska Juneau Gold Mining Co.*, 229 Fed. 966, 969 (C. C. A. 9, 1916), to the same effect.

The 1884 Act, in other words, referred to all lands in Alaska “actually in use or occupation”, not just Indian lands. It referred to the future acquisition of title to “such lands”. Unless Congress reversed a fundamental policy, title cannot be acquired to the open ocean, or even to tidelands. *Shively v. Bowlby*, 152 U. S. 1; *Mann v. Tacoma Land Co.*, 153 U. S. 273, 284. The contemporaneous construction of the act by the Secretary of the Interior excluded both tidelands and open ocean from its operation. 4 L. D. 128.¹⁹ And the most recent authoritative construction of the Act indicates that rights under it are personal, not tribal or community rights; the rights of “the individual Indians or other persons who happened to be occupying the lands in 1884”. *Miller v. United States*, 159 F. (2d) 997, 1005 (C. C. A. 9, 1947). Under no reasonable con-

¹⁹ The regulations under Section 8 of the 1884 Act (4 L. D. 128) issued on July 28, 1885, provided that the rules and regulations of the General Land Office for the United States were to apply. Those general regulations provided that tide lands and ocean waters were to be excluded.

struction of the Section 8 proviso can it be held to have included *any* rights to ocean waters.²⁰

Sections 14 and 15 of the Act of March 3, 1894 (c. 561, 26 Stat. 1095, 1100-1101; U. S. C., Title 48, Sec. 358) are likewise inapplicable here. Section 15 may be quickly disposed of: it created the Amette Island Metlakatla Reservation (see pp. 64-65, *infra*) and the natives of Karluk can not possibly derive any rights under that section. Section 14, on which petitioner appears to rely, provides—

“That none of the provisions of the last two preceding sections of this act [providing for the entry, survey, and sale of land in Alaska] shall be so construed as to warrant the sale of any lands to which the natives of Alaska shall have prior rights by virtue of actual occupation.”

²⁰ *Heckman v. Sutter*, 119 Fed. 83, 128 Fed. 393 (C. C. A. 9, 1902, 1904), which is cited by petitioner (Br. p. 16), relates solely to tidelands, not to ocean waters. In that litigation the court below held that by virtue of the 1884 Act, an occupant of the upland area on the banks of a stream was entitled to an injunction to protect a right-of-way across the beach to the fishing area off the mouth of the stream, and the operation of a beach seine at the mouth of the stream. Even as respects tidelands, which are not involved in the present case, the lower court in the *Heckman* case stated (1 Alaska at p. 197): “It is not intended that this right of way shall give the complainants exclusive rights of fishing upon the tide flats, but it is intended that in pursuing their vocation in taking fish from the deep waters or along the tide flats in going and returning to and from their upland holdings that they shall in no wise be interfered with or hindered by other fishermen.” And as the court below pointed out (128 Fed. at p. 397), if the reasonable exercise of the upland owner's right of fishing requires the clearing and use of a small portion of the tide lands, there seems nothing even unjust in protecting such possession against the invasion of a rival in the business.” The result in the case might well have been the same had there been no statute involved.

applicable to Alaska at the time, in part because the natives were not sure how it would affect them." This statement contrasts with that of the Committee on Indian Affairs in its report on the bill (H. Rep. No. 2244, 74th Cong., 2d Sess.), which shows what Congress understood the act to be. The report stated (p. 2):

"This bill does not require an additional appropriation. It merely seeks to make effective the so-called Wheeler-Howard Act now largely inoperative in Alaska because seemingly by inadvertence the Secretary of the Interior was not authorized to complete the incorporation of Indian tribes in Alaska after these people had fully complied with the provisions of the Wheeler-Howard Act, that is to say, while sections of the said act (namely 9, 10, 11, 12, and 16) provide a way for the Alaskan Indians to organize and petition for the benefits of the act, the omission of section 17 creates a stalemate for it is this section that authorizes the Secretary of the Interior to issue the charter, a condition precedent to a loan:

* * * * *

Section 17 authorizes the Secretary of the Interior to issue the charters without which the loans provided for under section 10 may not be granted. It seems plain that this section was inadvertently omitted when the Wheeler-Howard Act was rewritten and passed in the turmoil of the last days of the Seventy-third Congress (June 18, 1934).

* * * * *

"The report of the Secretary of the Interior on this bill, dated March 4, 1936, succinctly sets out the controlling reasons for the enactment of the bill. Those reasons, quoting from the report, briefly are:

"In this list (of sections now extended to Alaska), there is one omission (sec. 17) the correc-

tion of which is basic to the satisfactory operation of the law in the Territory of Alaska and to the welfare of Alaska natives. Section 17 should be included. * * * The operation of section 10 is dependent upon section 17, which stipulates the method by which a tribe may secure a charter. * * * Clearly, this is an unintentional omission. Its effect, nevertheless, so far as Alaska natives are concerned, is to nullify the intent and purpose of that part of the act designed to aid Indian communities to obtain something of economic security. * * * In analyzing the provisions of H. R. 9866, it appears that nearly all of the remaining stipulations are necessary for the proper correction of this omission."

It is apparent from the committee report that Congress relied on the assertion of the Secretary just quoted: "In analyzing the provisions of H. R. 9866, it appears that nearly all of the remaining stipulations are necessary for the proper correction of this omission [of Section 17]". The report, after quoting that portion of the Secretary's letter, states (p. 2):

"Quite different is the situation in the United States proper where reservations already exist about which the tribes might organize for the purposes of this act. Not so in Alaska. The Secretary of the Interior therefore supports paragraph 2 of the bill as being necessary not only to the formation of chartered communities but also to protect projects begun under the provisions of the act. The Secretary says: 'Reservations set up by the Secretary of the Interior will accomplish this.'"

The Secretary himself, in his only statement on the meaning of the section as he understood it, told Con-

p. 33) are the seines on which the Karluk natives, and others, work as employees of the Alaska Packers Association (R. 309). It furnishes them now, as it has in the past, with living quarters as well as fishing gear. It pays them on a piece basis (so much per fish) at a scale fixed by union negotiations (R. 308). The Alaska Packers Association itself owns, at Karluk, a very large private tract including all of Karluk Spit, at the mouth of the river, from which the seine fishing is done (see map in Appendix, *infra*), and maintains there a radio-telephone station, an electric light plant, a cold storage plant, a commissary (the only commercial facility at Karluk) and even owns and rents to the United States the school building and living quarters for the teachers (R. 310-311). These facts, stated by respondents' witness Jones, were confirmed by the respondents' witness King (R. 235-236), and by petitioner's witnesses Ellanak (R. 353-354) and Malutip (R. 361-362), both natives of Karluk. Respondent Grimes also testified that since 1908, and even earlier, native Indian residents of Ouzinkie, 75 miles from Karluk, had fished at Karluk, and that he himself had employed mostly Ouzinkie natives on the boats he had sent there to fish (R. 262).

These are the undisputed facts shown by the record. Petitioner has not referred to them; rather, he has attempted to contradict them by citations to other sources. An examination of those sources will not support the conclusion which petitioner draws.

For example, at pp. 25-26 of his brief, petitioner states:

"Nor were these fishing activities of the Karluks limited to taking fish exclusively for their own consumption. They were commercial fishermen. As early as 1795, the Karluk natives are reported to

have engaged in commercial fishing transactions with the Russians."

Bancroft's *History of Alaska* is cited as authority.

Here are the facts, as revealed by secondary sources, including Bancroft.

Captain Shelikof, who established the first Russian colony in Alaska in 1784, spent the winter of 1785 at Karluk with his Russian followers, and established a fishery or saltery on Karluk Spit. The strait on which Karluk is located is named for him—Shelikof Strait. Bancroft, H. H., *History of Alaska, 1730-1885* (1935) p. 228; Andrews, C. D., *The Story of Alaska*, p. 45. Shelikof later received a charter from the Russian czar and formed the Russian-American Company, which continued to occupy and improve the fishery or saltery at Karluk. It was visited by the monk, Gedeon, in 1804. See Appendix, *infra*, pp. 91-92. The Russian-American Company used it as a source of supply of dried fish, or "yukola".^{21a}

Bancroft's authoritative work, which petitioner cites, shows that it was the Russians who controlled and op-

^{21a} Petitioner states "More than a century ago it was recorded that in one season at Karluk 300,000 red salmon were prepared as 'yukola'". He cites, as authority, *Statistical Review of the Alaska Salmon Fisheries*, U. S. Dept. of Commerce, Fisheries Doc. No. 1102, p. 664. For the convenience of the Court, we reprint p. 664 of that document in the Appendix, *infra*, pp. 90-91. It deals with commercial fishing and canning activities of white men at Karluk since 1867. The statement on the 300,000 salmon is derived from an early Russian work cited in the footnote on p. 664. We have also reproduced that statement in the Appendix, *infra*, pp. 91-92). It demonstrates that the Russian-American Company occupied and controlled the Karluk fishery as early as 1804, and that the native inhabitants were engaged, as they since have been, as workers and not as proprietors.

erated the fishery. The rights of the native inhabitants were given scant recognition by them. Fish taken at Karluk were taken under the direction of the Russian-American Company and were disposed of pursuant to the orders of that company. The native inhabitants were employees or something less than employees.²²

On October 18, 1867, the day Alaska was transferred from Russia to the United States, the predecessors of a company known as the Alaska Commercial Company purchased all of the assets of the Russian-American Company including those at Karluk. Johnson, S. P., *Alaska Commercial Company, 1868-1940*, pp. 5, 7, 8, 15; Andrews, *supra*, pp. 127, 128. Commercial fishing by Americans began at once. Three parties were engaged in 1867 in salting salmon at Karluk, and the Alaska Commercial Company commenced salting operations there in 1870. In 1882 the Karluk Packing Company

²² Pages 230 and 357 of Bancroft, referred to by petitioner as authority for his statement that the natives engaged in commercial transactions with the Russians in 1795, do not support that conclusion. At p. 230, Bancroft details the instructions which Captain Shelikof left when he returned to Russia in 1786: they included a requirement that 30 Russians stay at Karluk. At page 357, there is a footnote which reads:

"Two other bidarka fleets mustering 257 boats assembled during the same year at the village of Karluk, and after obtaining supplies of dried fish were despatched in the same direction. Each bidarka carried from 100 to 125 fish, but this food was used only in case of actual necessity. As a rule, fresh fish were caught and birds killed at every halting place. Klebnikof Schizn. Baranova, 34-5."

The two pages merely emphasize the position of domination which the Russian-American Company occupied with respect to the fishery at Karluk.

(which later was merged with the Alaska Packers Association referred to *supra*, pp. 55-56) converted the salt-ery into a cannery and began operation at Karluk Spit. See Johnson, *supra*, pp. 5, 7, 8, 15; Moser, J. F., *Salmon and Salmon Fisheries of Alaska* (U. S. Gov't., 1899) p. 144; Murray, Joseph, *Origin and Development of the Alaska Salmon Fisheries*, in *Seal and Salmon Fisheries and General Resources of Alaska* (1899) Vol. 2, p. 424.

Fish hatcheries for the artificial propagation of salmon were built, maintained and operated within the boundaries of the present reservation as early as 1891, by concerns engaged in salmon canning at Karluk. One such hatchery was built by the Alaska Packers Association in 1896 and operated each year until 1916. *Alaska Fisheries and Fur Industries in 1916*, Bur. Fisheries Doc. No. 838, Appendix II to *Report of U. S. Commissioner of Fisheries for 1916*. In 1900, in passing a special act to enable the Karluk Packing Company (the predecessor of Alaska Packers Association) to patent a claim extending more than 160 rods along the waterfront of Karluk Spit, the Committee on Public Lands (H. Rep. No. 34, 56th Cong., 1st Sess.) stated that the Karluk Packing Company—

“was engaged in the meritorious business of producing an article of food supply extensively used in the United States and exported to other countries as well. * * * It further appears that some 600 men are employed at these canneries in each season; that an expensive salmon fish hatchery, involving an original cost of \$40,000, is maintained by these parties on the Karluk river, wherefrom millions of salmon are annually spawned and sent down to restock the fish supply in the adjacent waters, and being the only hatchery thus maintained in the Alaskan waters by private enterprise.”

In 1890, the Superintendent of the Census, Robert P. Porter, summarized the early history of the Karluk fisheries in his *Report on Population and Resources of Alaska at the Eleventh Census, 1890* (Dept. of Interior, G. P. O. 1893). We have reprinted his statement in full in the Appendix, *infra*, pp. 92-94), together with the census enumeration, and a photograph and maps of Karluk Spit as it then appeared.

In 1897 a dispute arose over fishing rights at Karluk which reached the courts. *Pacific Steam Whaling Co. v. Alaska Packers Assn.*, 138 Cal. 632, 72 Pac. 161. The Association claimed that by virtue of its exclusive use of the waters of Karluk for more than five years it had acquired a permanent exclusive fishing right by prescription. The court denied that exclusive use could give a prescriptive right to ocean waters.

This summary, though longer than we should have liked, should serve to show that whether we rely on the undisputed facts in the record, or go to the published historical sources, we find no support for the assumption which underlies petitioner's argument on the 1884 and 1891 Acts—that the native inhabitants of Karluk had exclusive commercial fishing privileges in the ocean there. The plain fact is that they did not; since "time immemorial", as petitioner puts it, the ocean waters sought to be included in the Karluk Reservation have been fished in by Russians, by Americans, by the residents of other native villages of Alaska, as well as by Karluk natives. No matter what construction is given to the proviso of Section 8 of the 1884 Act, or of Section 14 of the 1891 Act, petitioner simply cannot demonstrate that the Karluk natives had exclusive use or occupancy or even claim of such to the ocean waters here involved.

4. MOREOVER, IN THE CONTEXT OF THE 1936 ACT, THE WORDS "AREA OF LAND" DO NOT WARRANT THE INCLUSION OF OCEAN WATERS.

Perhaps, in the detail of the last two points, the Court may have lost sight of the fact that petitioner seeks to rely on the 1884 and 1891 Acts *only* to be able to say that the words to be construed are "area of land" as used in categories (a) and (b) (*supra*, p. 42), rather than "public lands" as used in category (d). Even were petitioner to surmount the obstacles which the language of the 1884 and 1891 Acts, and the facts of history, place in his way, he would, in our judgment, still fail. We believe that when Congress used the word "land" in the 1936 Act, it did *not* mean ocean waters.

We recognize that, in this respect, we depart from the court below, but we venture to think that court gave too little weight to the nature and legislative history of the 1936 Act, which we set out below (pp. 67-74), and too much weight to the assumed analogy to earlier cases. We will not dwell on the point, since in all probability the Court will not reach it, but we will state our reasons briefly.

We may begin by reference to certain basic principles of construction of statutes yielding water rights. When the United States acquires new territory, the title to the bed of all navigable waters is acquired "for the benefit of the whole people, and in trust for the several states to be ultimately created out of the territory." *Shively v. Bowlby*, 152 U. S. 1, 57; *United States v. California*, 332 U. S. 19.²³ These principles of

²³ When the state is finally created, a trusteeship continues in the hands of the state, for the people of the state, that they may enjoy the rights of commerce, navigation and fishery. *Illinois Central R. R. v. Illinois*, 146 U. S. 387, 452; *Hardin v. Jordan*, 140 U. S. 371, 381. *United States v. California*, *supra*, holds that lands under ocean waters below low water mark remain in the United States even after statehood.

course, apply to Alaska. *Cf. Rasmussen v. United States*, 197 U. S. 516; U. S. C., Title 48, Sec. 411.

This is, of course, not an absolute presumption. The United States may grant titles or rights to such areas during the territorial period, and has in fact done so "in exceptional instances when impelled to particular disposals by some international duty or public exigency". *Shively v. Bowlby*, *supra*, 152 U. S. at p. 55.²⁴ Nevertheless, the presumption does have certain consequences.

First, it is well settled that public grants of riparian lands do not convey any title to the tidelands or lands underlying navigable waters. *Shively v. Bowlby*, *supra*. In contemplation of law, as well as realistically, the land lying below the line of ordinary high tide or high water mark is "not land, but water". *Baer v. Moran Bros. Co.*, 2 Wash. 608, 27 Pac. 470, 471 (1891), *aff'd*, 153 U. S. 287; *De Meritt v. Robison, Land Com'r.*, 102 Tex. 358, 116 S. W. 796, 797 (1909); *Money v. Wood*, 152 Miss. 17, 118 So. 357, 359 (1928).

The second consequence, which is in truth no more than a generalization of the first, is that the United States has never disposed of such areas by *general* legislation. In *Shively v. Bowlby* the Court pointed out that the United States (152 U. S. at p. 58)

" * * * may grant, for appropriate purposes, titles or rights in the soil below high water mark of tide waters. *But they have never done so by general laws; * * **" (Italics supplied.)

²⁴ Typical of such situations are *Damon v. Hawaii*, 194 U. S. 154, and *Carter v. Hawaii*, 200 U. S. 255 (recognition of prior Hawaiian grants); *Knight v. United States Land Association*, 142 U. S. 161 (recognition of prior Mexican grants); *Alaska Pacific Fisheries v. United States*, 248 U. S. 78 (*infra*, pp. 64-65).

See also *Borax Consolidated, Ltd. v. Los Angeles*, 296 U. S. 10, 17; *Mann v. Tacoma Land Co.*, 153 U. S. 273, 284; *Jackman v. Atchison T. & S. F. Ry.*, 24 X. M. 278, 170 Pac. 1036, 1050 (1918).

Even when the United States legislates with reference to Indians, disposals of tide lands and lands under navigable waters are not lightly to be inferred, and are not made by general laws. For example, in *United States v. Holt State Bank*, 270 U. S. 49, the United States contended that a grant of "land" or "lands" to an Indian tribe for a reservation had resulted in passing title to the bed of a lake within the reservation to the Indians. The Court denied the contention, holding that disposals of submerged lands by the United States during the territorial period "should not be regarded as intended unless the intention was definitely declared or otherwise made very plain" (270 U. S. at p. 55). To the same effect see *Brewer-Elliott Oil & Gas Co. v. United States*, 260 U. S. 77, 86; *Vickery v. Yahola Sand & Gravel Co.*, 158 Okla. 120, 12 P. (2d) 881, 883-884 (1932); *United States v. Mackey*, 214 Fed. 137, 146 (E. D. Okla. 1913), *rev'd*, on other grounds, 216 Fed. 126 (C. C. A. 8, 1914).²⁵ When the issue is not what Con-

²⁵ Petitioner suggests that the *Holt Bank* case may be distinguished as involving a treaty reservation, because that was "more like a disposal". He unwittingly impales himself on a dilemma: if the ocean waters are an "area of land" within the meaning of the 1884 or 1891 Acts, the Indians certainly have a compensable interest; preservation of that interest was the reason for those acts. On the other hand, if the ocean waters are "public lands" in which the Karluk natives have no compensable interest, then the 1884 and 1891 Acts can have no application.

It is only fair to add that we regard the difference between a "treaty" reservation and an "executive" reservation as immaterial to the meaning of the word "land" as applied to ocean waters. The public, for whom the waters are held in trust, is equally affected either way.

gress has done directly, but what Congress had delegated to be done administratively, as here, it certainly should be very clear indeed that authority has been conferred so to deal with ocean waters as to deprive the general public of its normal privileges therein. Such authority should never be inferred.

The 1936 amendment is, of course, a "general law". Petitioner states (Br. p. 24) that the Act "is generally applicable to all Indians in Alaska." It does not deal with *this* reservation, but generally with the inclusion of Alaskan lands in Indian reservations. The foregoing decisions establish not only that Congress has never, at least up to this time, made such a statute a vehicle for the disposition of ocean waters, but also the strong presumption of statutory construction that "waters" are not included within "lands" unless the contrary is "definitely declared or otherwise made very plain". In the instant case there is no such declaration, no such clarity. Indeed there is not even a scintilla of evidence on the face of the statute, nor in its legislative history which we discuss below, pp. 67-74, that Congress meant by the 1936 Act to authorize the Secretary of the Interior in his discretion to make any or all of the Northern Pacific Ocean into Indian reservations.

The court below and petitioner cite *Alaska Pacific Fisheries v. United States*, 248 U. S. 78; and *Moore v. United States*, 157 F. (2d) 760 (C. C. A. 9, 1946), *certiorari denied*, 330 U. S. 827, as authority for the proposition that when Congress uses the term "land" it intends to include ocean waters. This case, however, is wholly different. The *Fisheries* case involved Section 15 of the Act of March 3, 1891 (26 Stat. 1101), by which Congress itself created the reservation described as "the body of lands known as Annette Islands". Such a statute is specific, not general, and under the rule of

Shively v. Bowlby, supra, may, if appropriate, be interpreted as including water. Here, on the contrary, we are interpreting a general statute applicable anywhere and everywhere in Alaska. Moreover, the language of the statute is wholly different than in the instant case: the phrase under construction in the *Fisheries* case was not simply "land", but "the body of lands known as Annette Islands". That phraseology is well calculated to include surrounding waters. The simple term "land" is quite different. In the *Fisheries* case the Court could say (p. 89):

"It [Congress] did not reserve merely the site of their village, or the island on which they were dwelling, but the whole of what is known as Annette Islands, and referred to it as a single body of lands.. This, as we think, shows, that the geographical name was used, as is sometimes done, in a sense embracing the intervening and surrounding waters as well as the upland—in other words, as descriptive of the area comprising the islands."

No such line of reasoning could possibly apply in the present case.

The *Moore* case involved only tidelands and a navigable river; there was no claim there, as there is here, that the reservation included ocean waters. Moreover, in that case the court was again construing a specific treaty dealing with a specific group, the Quillayute Indians, living at the mouth of one river. Under all the circumstances of that case, the clause in a treaty referring to a "tract or tracts of land sufficient for their wants" was held to include the bed of the river and certain adjoining tidelands.

What, then, by way of summary, do we have, as respects the language of the 1936 Act? The first indication that it does not give to the Secretary the power to

extend reservations into the ocean is that there is certainly no specific grant of such an authority. Congress, had it wanted to do so, could have given the authority in question by the addition of two or three words. If we are to assume that Congress had the intention which petitioner imputes to it, we must also assume that Congress was almost incredibly clumsy in its expression.

But all the internal evidences indicate that Congress cannot fairly be charged with such clumsiness. Congress, we believe, said exactly what it meant—the Act permits inclusion within Indian reservations of certain areas of *land* within the coastal boundaries of Alaska. Thus a reservation, to be effective, requires approval of the Indians or Eskimos “resident thereof”. For petitioner’s theory to be consistent, he must contend that the Karluk Indians are “residents” of the ocean. Moreover, the last clause of Section 2, reserving all claims, locations, and entries under the laws of the United States, is also draftmanship consistent only with an eye to dry land.

Moreover, the effect of petitioner’s construction of the act puts no limits on the Secretary’s powers. He finds a basis here in a one-third acre school yard to set aside for 57 adults some 35,000 acres of land and a 15-mile segment of the ocean from which hundreds of non-Karluk fisherman are excluded with the loss of millions of dollars of investment built up there over a period of over a century. What he would find as a basis for action elsewhere is of course purely speculative, but petitioner must necessarily concede that he believes Congress was willing, and meant by this choice of words, to give the Secretary of the Interior power, in his discretion, to put the entire ocean for three miles off the coast of Alaska plus the continental shelf into Indian

reservations.²⁶ And as the greatest unlikelihood of all, he must believe that Congress, which had it wished to could have conferred this power by the addition of a few simple words, left those words out because it thought that all these consequences would follow from the use of the words "public land".

We submit that by any common sense "natural, straightforward and literal"²⁷ interpretation of the 1936 Act, the ocean may not be put into Indian reservations at the discretion of the Secretary of the Interior.

C. THE LEGISLATIVE HISTORY OF THE 1936 ACT PRECLUDES INCLUSION OF OCEAN WATERS IN AN INDIAN RESERVATION.

The construction of the 1936 Act, however, need not be resolved solely on its words, aided by the principles of interpretations which we have already discussed. Even though that alone would be ample, we have for the 1936 Act significant legislative history, which also compels the same conclusion.

The 1936 Act is an amendment to the Wheeler-Howard Act of 1934 (c. 576, 48 Stat. 984). The Wheeler-Howard Act had as its basic purpose the permitting of an experiment in Indian communal ownership of property under the guidance of the Secretary of the Interior. It conferred no power to create reservations. Section 13 of that Act made certain sections applicable to the Territory of Alaska.

Petitioner now states (Br. p. 29) that "Most of the provisions of the Wheeler-Howard Act were not made

²⁶ *United States v. California, supra*; Executive Proclamation No. 2667, 10 F. R. 12303 (1945).

²⁷ Frankfurter, "Some Reflections on the Reading of Statutes," 47 Col. L. Rev. 527, 536.

ediction. The penalties of Section 6 of the White Act include a \$5,000 fine on *every* "person, company, corporation, or association" involved, plus loss of boats, gear, and all fish taken. Moreover, all gear, including boats, and all fish caught, are subject to summary seizure. A business cannot function under such a cloud. The exercise or threat of exercise of these sanctions would stop all fishing by, or for, respondents in the Karluk waters, and compliance with the invalid regulation would thus be compelled (R. 128, 146, 182, 190, 191, 197, 220, 227). Since, as is shown above, respondents' canneries at Kodiak Island depend heavily on this supply without any available alternative, the enforcement of the regulations threatens the survival of the canneries. In these circumstances, equity has power to determine whether the regulation requiring these results is valid.

The existence of the threat of enforcement, and of the ruinous consequences of the enforcement were it to occur, are of course matters of fact. On both, the District Court has made findings (R. 35-36) and these findings have been approved by the court below. They will not be reviewed again here. *United States v. O'Donnell*, 303 U. S. 501, 508.

CONCLUSION

We submit, therefore, that the judgment of the court below should be affirmed. Petitioner has asserted throughout the pages of his brief so many arguments, and made, in the course of those arguments, so many assertions, and colored the whole with so many inferences and implications, that we have not even attempted to deal with each item individually. Those which we deemed important we have covered; the lack of reference to others is no more than a judgment that

they are wholly irrelevant to the principal issues in the case.

Respectfully submitted,

EDWARD F. MEDLEY,

FRANK L. MECHEM,

W. C. ARNOLD,

Seattle, Washington.

Attorneys for Respondents.

COVINGTON, BURLING, RUBLEE,

ACHESON & SHORB,

Washington, D. C.

Of Counsel.

October, 1948.

gress in his letter to the Committee (H. Rep. No. 2244, *supra*, p. 4) :

"Section 2 of the bill, which gives to the Secretary of the Interior power to designate certain lands as Indian reservations is, therefore, a logical sequence of the legislative history regarding Indian lands in Alaska and *provides a method by which the financial aid provisions of the Indian Reorganization Act may be extended to those Indians and Eskimos of Alaska who occupied established villages.*" (Italics supplied.)

There were no hearings on the bill. The Senate Report is substantially identical with the report of the House (S. Rep. No. 1748). Nothing appears *anywhere* in the legislative history which states, or even suggests, that when Congress used "public lands" or "land" in Section 2, it had in mind ocean waters. We utterly fail to see how petitioner can say (Br. p. 32) that "Congress in the 1936 Act established the policy of protecting the Indians' fishing grounds from usurpation by the salmon industry." On the contrary, the 1936 amendment, beyond the shadow of a doubt, was, and was intended to be, a minor, technical, non-controversial amendment to correct an inadvertent omission which denied to the Indians and Eskimos of Alaska the financial benefits of the Wheeler-Howard Act.

Petitioner, of course, cannot find a line, or even a word, in the legislative history of the act to show that Congress, or the Committees, or even any one member of Congress, ever thought that he was giving the Secretary of the Interior power to put ocean waters into Indian reservations. Instead, presumably with the thought that he must show *some* legislative history, petitioner falls back on the history of many other statutes, and concludes that Congress knows that fish-

eries are "the basis of the economic life of Alaska Indians" (Br. p. 30).²⁸ Congress, we can also assume, knew that the fishing industry was by far the chief industry in Alaska. Petitioner proves by these references to the legislative history of other bills, if he proves anything, only that if Congress intended to legislate on so vital a subject, it is more than passing strange—it is incredible—that no member of Congress (nor the Secretary) would have seen fit to comment on that fact.²⁹

Disposition of the public domain is a matter of vital concern to the nation, and Congress does not legislate in this vital field by happenstance. Thus in his testimony in favor of the original Wheeler-Howard Act, Commissioner Collier, Head of the Bureau of Indian

²⁸ Petitioner somewhat overstates his case, however. He argues (p. 24) that Congress has repeatedly exempted the Indians from acts restricting fishing. None of the acts he cites carries any such exemption. The Act of June 14, 1906 (c. 3299, 34 Stat. 263) prohibited *aliens* from fishing, and exempted Alaska natives, who were then not citizens and not eligible for citizenship. Alaska natives are now, of course, citizens. The Act of June 6, 1924 (c. 272, 43 Stat. 465) exempted the taking of fish for local food requirements or for use as dog food. It applies equally to Indians and whites. The Act of April 16, 1934 (c. 146, 48 Stat. 594) has an exemption for "native Indians and bona fide permanent white residents." See footnote 14, *supra*.

²⁹ Petitioner seeks to give the impression (pp. 25-27) that Congress passed the 1936 Act with Karluk fisheries, in particular, in mind. Not only did Congress not have fisheries in mind at all, as we have shown, but the act is not a special act for Karluk, but an act which, on petitioner's view, applies to all the waters of Alaska. We should add that petitioner's discussion of the Karluk fisheries in this connection reflects his erroneous view of the history of these fisheries over the past 150 years, which we have already discussed above (pp. 55-60, *supra*).

Affairs, stated (Hearings on S. 2755, 73d Cong., 2d Sess., p. 35):

"I want to make it clear regarding the annexation of public domain by Indian reservations. That is a matter for Congress. This bill does not affect that. It is not an annexation of public domain."

Such testimony reflects a policy, and a policy which would scarcely have been upset to the point of giving the Secretary of the Interior suzerainty over the sea without a word of hearing or debate.

As the Secretary of the Interior himself wrote in his letter in support of the 1936 amendment, it was "a logical sequence of the legislative history regarding Indian lands in Alaska", and we may assume that the usage of Congress in 1936 in amending the Wheeler-Howard Act was the same as the usage of Congress in passing the original Wheeler-Howard Act in 1934. Analysis of that statute shows that in this "sequence of the legislative history", land cannot conceivably mean ocean water.

We submit two items of proof: First, the word "land" or "lands" appears twenty-nine times in the Wheeler-Howard Act. It is used in nine of its nineteen sections. In each of those instances, it is inconceivable as a matter of common sense, as well as of legal analysis, that the word could have been used so as to include ocean waters.³⁰ We cannot believe that Congress used the word "lands" twenty-nine times in a manner excluding ocean water and then, in a technical amendment to the Act, and without a word to indicate change of intent, suddenly gave not only that word

³⁰ The term "land" is used in the following contexts in the Wheeler-Howard Act:

but also the more explicit phrase "public lands" a wholly different meaning. The presumption is entirely in the other direction; whenever possible a word will have but one meaning in one statute or in closely related statutes. *United States v. Cooper Corp.*, 312 U. S. 600, 606-607, and cases cited; *United States v. Jefferson Electric Mfg. Co.*, 291 U. S. 386, 396, and cases cited.

Second, when Congress wanted, in the Wheeler-Howard Act, to give the Secretary jurisdiction over water rights, it said so. Section 5 of the Wheeler-Howard Act authorizes the Secretary of the Interior to acquire lands. The section, having referred to land, continues specifically to refer to "water rights". In short, when Congress meant to give the Secretary of the Interior power in behalf of Indians over water rights it specified them and defined the power which it was granting.

The Court must also be aware that, if petitioner is correct, this seemingly innocuous and undiscussed minor amendment to the Wheeler-Howard Act has given the Secretary of the Interior a power of life and

Reference	Number of Uses	Sections
Lands in severalty and in trust	4	1, 2 & 4
Lands previously indisposible	2	3
Reclamation lands	1	3
Papago & Navaho lands	5	3 & 5
Usage related to foregoing	1	3
Sale and exchange in re restricted lands	7	4 & 17
Land purchase in specific distinction from water	7	5 & 7
Sale, etc. of lands	2	16
Total	29	

death over the Alaskan salmon industry. There is no limit at all put upon his power, as petitioner interprets it, to include any or all of the fisheries of Alaska within Indian reservations.³¹ We submit Congress would not have taken such a step without at least discussing its significance on the floor of the Congress and without giving the industry a chance to be heard. Congress has previously dealt with such legislation only after long hearings and long debate. And justly so, for Alaskan waters produce an annual pack of salmon worth about \$60,000,000, which makes it far and away the chief industry of Alaska. (Report of Sec. Int. on H. R. 3859, 80th Cong., 1st Sess., June 11, 1947.) The basic fishery statute—the White Act—was passed after the President of the United States personally inspected the situation in Alaska, and after full hearings and long debate.

It is unbelievable that Congress should have accorded to the Secretary of the Interior in this casual manner a *carte blanche*. One would have to believe that Congress had thus cavalierly reversed—without debate, without discussion, without hearing, without reference to the fact that it was doing so—two long-established policies, the one against disposing of ocean waters by general legislation, and the other against summary disposition of Alaskan fishing rights. We simply do not believe that it did so.

³¹ Petitioner challenges this statement (Br. pp. 31-32) by conceding that there must be some *land* to which the water is adjacent in every reservation, reserved for or occupied by Indians. The significance of this may be judged from the fact that the land to which this Karluk ocean is adjacent is a school yard, 35 acres in size. See ftn. 15, *supra*. *Anything*, in petitioner's view, will do.

D. THERE IS NO SIGNIFICANT ADMINISTRATIVE CONSTRUCTION OF THE 1936 ACT.

Petitioner recites an Acting Solicitor's Opinion of April 19, 1937, which advised the Secretary of the Interior that he could include ocean waters in an Indian reservation under the 1936 Act. The opinion was based largely on the premise that "public lands" was synonymous with "public domain" and tide lands and ocean waters were "public domain"; and that the Act of 1936 was not "general legislation" within the rule of *Shively v. Bowlby, supra*. Perhaps because of the Secretary's own grave doubts no administrative action was taken.³² The first administrative construction of the 1936 Act to include ocean waters was Public Land Order No. 128, setting up the Karluk Reservation, in May, 1943. The other administrative acts recited by petitioner (Br. p. 36) consist of three other reservations created later in 1943 and in 1946—none of them, incidentally, including any waters used for commercial fishing.

³² The Solicitor, in an opinion to the Secretary dated September 14, 1937 (No. 31634) indicates one reason why no administrative action was forthcoming until six years later. He there supports the General Land Office in its contention that several huge reservations of over 1,000,000 acres each, with large ocean areas included, be not approved as recommended by the Indian Office. The Solicitor's reasoning is interesting, in view of the dependency of the Karluk Reservation on the 0.35 acre school site: "The extent of the adjacent area which may be included in the designation as an Indian reservation of an existing reserve must depend upon the needs of the reserve to which the area is to be added. It should not be so extensive as to exceed the requirements of the occupants of the existing reserve. Otherwise, it would be for all intents and purposes a separate reservation." The opinions of the Solicitor's office do not indicate when that reasoning was overruled.

There can scarcely be a significant administrative construction based on a legal opinion which was not followed by administrative action for six years, and which was then immediately challenged. We think it far more significant that in 1944 a Senate Committee charged with responsibility for legislation dealing with Alaskan fisheries specifically rejected the view of the Department. S. Rep. No. 733, 78th Cong., 2d Sess., p. 6, quoted at pp. 30-31, *supra*. See *Sioux Tribe v. United States*, 316 U. S. 317, 329-330.

E. THE 1936 ACT CANNOT BE CONSTRUED AS IN CONFLICT WITH THE WHITE ACT.

The final item of proof against construction of the 1936 Act is its patent inconsistency with the basic policy of the White Act. That inconsistency we have already discussed in Point I, together with petitioner's final effort to extricate himself by the argument that the 1936 Act effected an implied repeal of the White Act.

The significance, here, is that this casual amendment in 1936 of an omission in draftsmanship of the original Wheeler-Howard Act, passed, as we have seen, with no hearings, no discussion, no debate, and *no mention of fish or fishing*, not only must, on petitioner's theory, be the first general grant of ocean waters in one hundred and fifty years, but also a complete *volte face* on the fundamental premise on which Alaskan salmon fishing has been dealt with since 1924—that there should be *no exclusive fishing rights*. We have already, at pp. 67-74, *supra*, indicated that, so far as every indicia of Congressional intent shows, the 1936 amendment was thought to be, and was treated as, a purely Indian matter. We concede that repeals by implication are *possible*, but petitioner, at the same time,

should be willing to concede that they are, and always have been, looked upon with disfavor. *United States v. Borden Co.*, 308 U. S. 188, 198-199, and cases cited. When the argument for implied repeal requires a reversal of a basic, long-standing policy arrived at after long debate by what can be truly called a casual legislative act, a repeal by implication is simply not credible.

III.

THE DISTRICT COURT HAD JURISDICTION TO HEAR THE CAUSE AND GRANT EQUITABLE RELIEF.

Petitioner makes two jurisdictional objections: that the Secretary of the Interior was an indispensable party, and that respondents are trespassers not entitled to aid from an equity court. Neither point warrants extensive discussion.

A. THE SECRETARY OF THE INTERIOR IS NOT AN INDISPENSABLE PARTY.

This Court, in *Williams v. Fanning*, 332 U. S. 490, has recently held that in a suit against the local postmaster to review a fraud order, the Postmaster General was not an indispensable party. The opinion points out that the superior official is not indispensable "if the decree which is entered will effectively grant the relief desired by expending itself on the subordinate official who is before the court." The court pointed out that in cases in which the superior officer had been held to be indispensable, the suit sought to require him to take some affirmative action—to issue a land patent (*Warner Valley Stock Co. v. Smith*, 165 U. S. 28); to delegate additional authority to issue permits (*Gierick v. Rutter*, 265 U. S. 388);

or to pay out money (*Webster v. Fall*, 266 U. S. 507).

The present case is squarely within the *Williams v. Fanning* rule. The relief requested is against the threatened imposition of the drastic White Act sanctions, and petitioner is the one who makes that threat. As the Court said in *Williams v. Fanning*: "If he desists in those acts, the matter is at an end."

Petitioner attempts to avoid the *Williams v. Fanning* case by arguing that the challenged regulation, Section 208.23(r), can be read as *two* regulations: the first sentence, a complete prohibition of commercial fishing and by itself valid; the second sentence, the exempting of the Karluks and their permittees. The argument, therefore, is that respondents seek a judgment that they may fish in the area, rather than relief against action under an invalid regulation. *Dow v. Ickes*, 123 F. (2d) 909 (App. D. C. 1941), *certiorari denied*, 315 U. S. 807, is relied on as analogous.

This argument is not only fallacious as a matter of logic, but it also makes a nullity of the limitations of the White Act. The regulation is a whole. Substance, not style or typography, determines legal validity. A regulation cannot say in one sentence that no one may fish, and in a second sentence that one group and their temporary permittees *may* fish, without creating an exclusive right of fishery. Such a regulation is not of general application, and denies a fishing right to some where fishing is permitted to others. If the limitations upon which Congress put so much emphasis and placed so much reliance mean no more than petitioner suggests, they are impotent indeed; the Secretary need only, in the first sentence of his regulations, forbid all fishing in Alaska, and then grant fishing rights to individuals, companies, groups, or in any other forbidden way that he might select.

But the fallacy cuts even deeper. Respondents are not seeking an injunction giving them a right to fish in violation of the White Act.

They seek, rather, an injunction in the terms of that Act—an injunction restraining petitioner from interfering with their fishing in "waters where fishing is permitted by the Secretary" under the regulation. That right is specifically guaranteed them by the Act. *Freeman v. Smith*, 44 F. (2d) 703, 704 (C. C. A. 9, 1930). If the first sentence of subsection (r) stood alone—if the area were in fact closed to all for conservation reasons—we would have a different regulation and a different case. *Dow v. Ickes*, as petitioner's quotation indicates (p. 53), was a suit to require the "opening of new sites or additional general areas for fishing". It lends no support to the dialectic attempt to read one sentence of the subsection on respondents to deny them rights, and another sentence of the subsection on Karluk natives to give them rights.

Petitioner asserts that this was an exercise of Secretarial discretion because the Secretary might have issued different orders than he did. (Br. pp. 54-55.) So he might. But respondents contend that by no form, choice, or alternative could he issue any order which simultaneously excluded respondents from the area in question and granted exclusive fishing rights to someone else. Petitioner has suggested no possible valid road to that end.

Petitioner further contends that the Secretary must be joined because he, and not petitioner, handles Indian affairs. But respondents are not seeking to enjoin the handling of Indian affairs, they are seeking to enjoin the enforcement of particular orders affecting themselves. Petitioner is the vital link in the enforcement process (R. 33, 34). Traditionally and classically such

an action may be brought, not against the policy-making officials, but against the enforcement officials. *Ex parte Young*, 209 U. S. 123, 161.

B. RESPONDENTS ARE ENTITLED TO EQUITABLE RELIEF.

As his Point IIIA petitioner contends that equity "will not thus aid a willful wrongdoer". He further argues that equity will not protect a trespasser, saying, "Even if it be assumed that the remedies of the White Act might not properly be invoked in that area, respondents may not enjoin the invocation of such penalties as a punishment for their trespasses." (Br. p. 56). These contentions are unsound for two reasons:

1. It assumes the point in issue to declare that equity has no jurisdiction because respondents are willful wrongdoers. Whether they are or not is to be determined by this suit. That issue is relevant not to jurisdiction, but to the merits. If, as the respondents contend, the purported reservation of ocean waters is invalid, then respondents are necessarily not trespassers. If the Court should not pass on the point, it drops out of the case for all purposes including the jurisdictional; for by traditional equity doctrine the "clean hands" rule applies only when the misdeed of the moving party involves squarely and precisely the point for which equity is invoked. See Pomeroy, *Equity Jurisprudence*, 5th ed., Section 399. The Act of 1936 and the White Act are quite distinct, and to say that an alleged trespass under the one deprives the respondents of the right to remonstrate against the imposition of the penalties of the other is to make an alleged trespasser an outlaw, subject without right of effective protest to any penalty or series of penalties that may be culled from the entire criminal code.

2. More important, respondents cannot accept petitioner's argument that, for jurisdictional purposes only, it may be "assumed" that the White Act does not apply. The whole object of this litigation is to demonstrate that neither the Act of 1936 nor the White Act, under both of which the Secretary of Interior has purported to act, can authorize his action. Were petitioner willing to stipulate that respondents would not be subject to the penalties of the White Act, the situation would be quite different. But the respondents are in fact constantly threatened with enforcement of the fishery regulation in question by Fish and Wildlife Service agents working directly under petitioner's supervision and control.

While equity will not ordinarily enjoin the enforcement of a criminal statute or an order issued thereunder, equity can act where the order is invalid and the penalties high, and most certainly where immediate seizure and forfeiture are concerned. *Ex parte Young, supra*. When property rights are involved, equity "binds the defendant not to resort to criminal proceedings to enforce illegal demands," *Philadelphia Co. v. Stimson*, 223 U. S. 605, 621, particularly when enforcement will make impossible the continuance of a business in all other respects proper. *Stafford v. Wallace*, 258 U. S. 495; *Bueneman v. Santa Barbara*, 8 Cal. (2d) 405, 65 P. (2d) 884 (1937). In short, serious jeopardization of property rights combined with high penalties gives equity jurisdiction. *Dobbins v. Los Angeles*, 195 U. S. 223, 241; *Petroleum Exploration, Inc. v. Public Service Commission*, 304 U. S. 209, 217-220.

-In this case, respondents' legitimate business in the Karluk area cannot function under the overhanging threat of the enforcement of this clearly invalid order. This is the typical case for the exertion of equity juris-

APPENDIX

THE WHITE ACT, c. 372, 43 STAT. 464, JUNE 6, 1924, AS AMENDED
BY c. 431, 43 STAT. 652, JUNE 18, 1926

SECTION 1. That for the purpose of protecting and conserving the fisheries of the United States in all waters of Alaska the Secretary of Commerce from time to time may set apart and reserve fishing areas in any of the waters of Alaska over which the United States has jurisdiction, and within such areas may establish closed seasons during which fishing may be limited or prohibited as he may prescribe. Under this authority to limit fishing in any area so set apart and reserved the Secretary may (a) fix the size and character of nets, boats, traps, or other gear and appliances to be used therein; (b) limit the catch of fish to be taken from any area; (c) make such regulations as to time, means, methods, and extent of fishing as he may deem advisable. From and after the creation of any such fishing area and during the time fishing is prohibited therein it shall be unlawful to fish therein or to operate therein any boat, seine, trap, or other gear or apparatus for the purpose of taking fish; and from and after the creation of any such fishing area in which limited fishing is permitted such fishing shall be carried on only during the time, in the manner, to the extent, and in conformity with such rules and regulations as the Secretary prescribes under the authority herein given: *Provided*, That every such regulation made by the Secretary of Commerce shall be of general application within the particular area to which it applies, and that no exclusive or several right of fishery shall be granted therein, nor shall any citizen of the United States be denied the right to take, prepare, cure, or preserve fish or shellfish in any area of the waters of Alaska where fishing is permitted by the Secretary of Commerce. The right herein given to establish fishing areas and to permit limited fishing therein shall not apply to any creek, stream, river, or other bodies of water in which fishing is prohibited by specific provisions of this Act, but the Secretary of Commerce through the creation of such areas and the establishment of closed seasons may further extend the restrictions and limitations imposed upon fishing by specific provisions of this or any other Act of Congress: *Provided further*, That the Secretary of Commerce is hereby authorized to permit the tak-

ing of fish or shellfish, for bait purposes only, at any or all seasons in any or all Alaskan Territorial waters.

It shall be unlawful to import or bring into the Territory of Alaska, for purposes other than personal use and not for sale or barter, salmon from waters outside the jurisdiction of the United States taken during any closed period provided for by this Act or regulations made thereunder.

Sec. 6. Any person, company, corporation, or association violating any provision of this Act or of said Act of Congress approved June 26, 1906, or of any regulation made under the authority of either, shall, upon conviction thereof, be punished by a fine not exceeding \$5,000 or imprisonment for a term of not more than ninety days in the county jail, or by both such fine and imprisonment; and in case of the violation of section 3 of said Act approved June 26, 1906, as amended, there may be imposed a further fine not exceeding \$250 for each day the obstruction therein declared unlawful is maintained. Every boat, seine, net, trap, and every other gear and appliance used or employed in violation of this Act or in violation of said Act approved June 26, 1906, and all fish taken therein or therewith, shall be forfeited to the United States, and shall be seized and sold under the direction of the court in which the forfeiture is declared, at public auction, and the proceeds thereof, after deducting the expenses of sale, shall be disposed of as other fines and forfeitures under the laws relating to Alaska. Proceedings for such forfeiture shall be in rem under the rules of admiralty.

That for the purposes of this Act all employees of the Bureau of Fisheries, designated by the Commissioner of Fisheries, shall be considered as peace officers and shall have the same powers of arrest of persons and seizure of property for any violation of this Act as have United States marshals or their deputies.

Sec. 7. Sections 6 and 13 of said Act of Congress approved June 26, 1906, are hereby repealed. Such repeal, however, shall not affect any act done or any right accrued or any suit or proceeding had or commenced in any civil cause prior to said repeal; but all liabilities under said laws shall continue and may be enforced in the same manner as if committed, and all penalties, forfeitures, or liabilities incurred prior to taking effect hereof, under any law em-

braced in, changed, modified, or repealed by this Act, may be prosecuted and punished in the same manner and with the same effect as if this Act had not been passed.

Sec. 8. Nothing in this Act contained, nor any powers herein conferred upon the Secretary of Commerce, shall abrogate or curtail the powers granted the Territorial Legislature of Alaska to impose taxes or licenses, nor limit or curtail any powers granted the Territorial Legislature of Alaska by the Act of Congress approved August 24, 1912, "To create a legislative assembly in the Territory of Alaska, to confer legislative power thereon, and for other purposes."

ACT OF MAY 1, 1936, c. 254, 49 STAT. 1250.

... sections 1, 5, 7, 8, 15, 17, and 19 of the Act entitled "An Act to conserve and develop Indian lands and resources; to extend to Indians the right to form business and other organizations; to establish a credit system for Indians; to grant certain rights of home rule to Indians; to provide for vocational education for Indians; and for other purposes", approved June 18, 1934 (48 Stat. 984), shall hereafter apply to the Territory of Alaska: *Provided*, That groups of Indians in Alaska not heretofore recognized as bands or tribes, but having a common bond of occupation, or association, or residence within a well-defined neighborhood, community, or rural district, may organize to adopt constitutions and bylaws and to receive charters of incorporation and Federal loans under sections 16, 17, and 10 of the Act of June 18, 1934 (48 Stat. 984).

Sec. B. That the Secretary of the Interior is hereby authorized to designate as an Indian reservation any area of land which has been reserved for the use and occupancy of Indians or Eskimos by section 8 of the Act of May 17, 1884 (23 Stat. 26), or by section 14 or section 15 of the Act of March 3, 1891 (26 Stat. 1101), or which has been heretofore reserved under any executive order and placed under the jurisdiction of the Department of the Interior or any bureau thereof, together with additional public lands adjacent thereto, within the Territory of Alaska, or any other public lands which are actually occupied by Indians or Eskimos within said Territory: *Provided*, That the designation

by the Secretary of the Interior of any such area of land as a reservation shall be effective only upon its approval by the vote, by secret ballot, of a majority of the Indian or Eskimo residents thereof who vote at a special election duly called by the Secretary of the Interior upon thirty days' notice: *Provided, however,* That in each instance the total vote cast shall not be less than 30 per centum of those entitled to vote: *Provided further,* That nothing herein contained shall affect any valid existing claim, location, or entry under the laws of the United States, whether for homestead, mineral, right-of-way, or other purpose whatsoever, or shall affect the rights of any such owner, claimant, locator, or entryman to the full use and enjoyment of the land so occupied.

PUBLIC LAND ORDER 128, MAY 27, 1943, R. 17, 18.

ALASKA

Modifications of Executive Order Designating Lands as Indian Reservation

By virtue of the Authority contained in the Act of June 25, 1910, c. 421, 36 Stat. 847 as amended by the act of August 24, 1912, c. 369, 37 Stat. 497 (U. S. C., title 43, secs. 141-143), and the act of May 1, 1936, c. 254, 49 Stat. 1250 (U. S. C., title 48, sec. 358a), and pursuant to Executive Order No. 9146 of April 24, 1942: It is ordered, as follows:

1. Executive Order No. 8344 of February 10, 1940, withdrawing Kodiak and other islands, Alaska, for classification and in aid of legislation, is hereby modified to the extent necessary to permit the designation as an Indian reservation of the following-described area;

Beginning at the end of a point of land on the shore of Shelikof Strait on Kodiak Island, said point being about one and one-quarter miles east of Rocky Point and in approximate latitude $57^{\circ} 39' 40''$ N., longitude $154^{\circ} 12' 20''$ W.;

Thence south approximately eight miles to latitude $57^{\circ} 32' 30''$ N.;

Thence west approximately twelve and one-half miles to the confluence of the north shore of Sturgeon River with the east shore of Shelikof Strait;

Thence northeasterly following the easterly shore of Shelikof Strait to the place of beginning, containing approximately 35,200 acres.

2. The area described above and the water adjacent thereto extending 3,000 feet from the shore line at mean low tide, are hereby designated as an Indian reservation for the use and benefit of the native inhabitants of the native village of Karluk, Alaska, and vicinity:

Provided, That such designation shall be effective only upon its approval by the vote of the Indian and Eskimo residents of the area involved in accordance with section 2 of the act of May 1, 1936, supra; And provided further, That nothing herein contained shall affect any valid existing claim or right under the laws of the United States with the purview of that section.

HAROLD L. ICKES,
Secretary of the Interior.

May 22, 1943

(F. R. Doc. 43-9892; Filed June 19, 1943; 10:58 a.m.)

REGULATION 208.23 (OF WHICH SECTION (c) IS PARTICULARLY RELEVANT).

Sec. 208.23. Waters closed to salmon fishing. All commercial fishing for salmon is prohibited as follows:

(a) Portage Bay, tributary to Alitak Bay: All waters of lagoon at head of southeast arm inside or markers placed at entrance, and all waters in the northeast arm within a line from a marker on the north shore 1 statute mile from the stream in the northeast corner of the bay to a marker on the opposite shore.

(b) Deadman Bay, tributary to Alitak Bay: All waters of Deadman Bay within 1 statute mile of the head of the bay.

(c) Western shore of Kodiak Island: All waters within 1 statute mile of the mouth of Red River.

(d) Karluk River: All waters within Karluk River and within 100 yards of its mouth where it breaks through Karluk Spit into Shelikof Strait.

(e) Uyak Bay: All waters of the bay south of 57 degrees 19 minutes north latitude.

(f) Zachar Bay, tributary to Uyak Bay: All waters of Zachar Bay east of 153 degrees 44 minutes west longitude.

(g) Spiridon Bay (or northeast arm of Uyak Bay): All

waters of Spiridon Bay south of 57 degree 37 minutes 6 seconds north latitude.

(h) East Arm, Uganik Bay, Kodiak Island: All waters within the arm south of a line extending from Mink Point northeasterly to a point on the northeast shore at 57 degrees 43 minutes 20 seconds north latitude.

(i) Terror Bay: All waters within the bay south of 57 degrees 44 minutes north latitude.

(j) Pasagshak Bay, at entrance to Ugak Bay: All waters within the bay.

(k) Ugak Bay: All waters within the bay west of 152 degrees 49 minutes west longitude.

(l) Kiliuda Bay: All waters of the bay west of 153 degrees 7 minutes west longitude.

(m) Old Harbor, Sitkalidak Strait: All waters within 1 statute mile of the mouth of the stream approximately 1 statute mile northeast of Old Harbor, Sitkalidak Strait.

(n) All bays of Afognak Island: All waters of the bays within lines indicated by markers erected for the purpose.

(o) Kafia Bay, on north shore of Shelikof Strait: All waters within 1 statute mile outside the entrance of the outer lagoon.

(p) Little River, west of Cape Ugat: All waters within 1 statute mile of the mouth of the stream.

(q) Kizhuyak Bay: All waters within one-half mile of the mouth of an unnamed stream entering the bay at approximately 57 degrees 49 minutes north latitude.

(r) All waters within 3,000 feet of the shores of Karluk Reservation (Public Land Order No. 128, May 22, 1943), beginning at a point on the east shore of Shelikof Strait, on Kodiak Island, latitude 57° 32' 30" N., thence northeasterly along said shore to a point 57° 39' 40".

The foregoing prohibition shall not apply to fishing by natives in possession of said reservation, nor to fishing by other persons under authority granted by said natives (49 Stat. 1250). Such authority shall be granted only by or pursuant to ordinance of the Native Village of Karluk, approved by the Secretary of the Interior or his duly authorized representative.

KARLUK RIVER DISTRICT

This district embraces a small section of the west coast of Kodiak Island in which the seining grounds at the mouth of Karluk River and those adjacent at Slide, Waterfall, and Tanglefoot, constitute one of the most compact fishing areas in all Alaska. Karluk River, a fine clear-water stream, is the outlet of Karluk Lake and the streams of its drainage basin, and is approximately 30 miles in length. It empties into a lagoon or estuary formed by the action of surf and tide which have thrown a high sand and gravel spit across the mouth of the river. This lagoon is about 3 miles long, and in the early days was the preferred seining ground, as operations could be carried on there without interruption by storms and heavy surf.

Although other species are taken in the fishery the remarkable red-salmon runs are of predominant importance. Both the river and the lake are relatively small, yet the abundance of red salmon is so great as to indicate that conditions are particularly favorable for this species. No other stream of similar size is known to produce such large runs, and there are only a few larger streams, such as the Fraser and the Kvichak Rivers, that have been more productive. Occasionally large runs of pinks have appeared and the three other species are taken in significant though much smaller numbers.

In the eighteenth century, Russian explorers discovered and reported great runs of salmon at Karluk, and the Indians, of course, knew of them long before the Russians came. It is a matter of record that 300,000 red salmon were prepared as "yukola" (dried without salting or smoking) in several seasons more than a century ago.⁸ Yet no commercial use seems to have been made of the Karluk salmon until after Alaska was purchased by the United States.

⁸ Sketches from History of American Orthodox Ecclesiastical Mission, Kodiak Mission, 1837-1894. Published by Monastery of Valaam, St. Petersburg, 1894. Translation by N. Gray, Kodiak, Alaska, 1925.

in 1867. The first cannery was built on Karluk Spit in 1882, and for six seasons this one plant operated without competition. The catches increased from 58,800 in 1882 to 1,004,500 in 1887, each intervening year showing a material gain over the preceding. It seems very probable that every salmon captured in these six years was taken in Karluk Lagóon, as fishing on the outside beaches was not engaged in until the competition incident to the establishment of more canneries forced such action.

In 1888, the number of canneries increased to 4, of which 3 were located at Karluk and 1 at Larsen Bay, and the catch amounted to approximately 2,781,000. In the next year, 2 additional canneries were opened and the combined catch of the 6 plants was 3,412,000, no part of which is presumed to have been made elsewhere than at Karluk River. In 1890, the catch was 3,149,000 without change in the number of canneries. The catch in 1891 was 3,500,000, with 6 canneries still in operation. From 1892 to 1895, a period of four years, the number of canneries varied from 3 to 5, and the catch varied from 2,056,000 in 1895 to 3,350,000 in 1894. In all these years no record was made of the number of salmon caught, but the catch has been computed from the reported pack in each year at the rate of 14 fish per case.

SKETCHES FROM HISTORY OF AMERICAN ORTHODOX ECCLESIASTICAL MISSION, KADIAK MISSION 1794-1837. PUBLISHED BY MONASTERY OF VALAAM, ST. PETERSBURG, 1894. TRANSLATED AND COPYRIGHTED BY N. GRAY, KODIAK, ALASKA, 1925.

SUPPLEMENT II.

From the manuscript of Fr. Gedeon, priest-monk of the Alexandro-Nereki cathedral.

(exact copy)

1804. June 8th.

Besides the above settlement there are on Kadiak the following ARTELS: (outlying settlements)

(5th). KARLUPSKAYA ARTEL on the North side of Kadiak—On an elevation near KARLUK River the fortress is surrounded by an earthen bulwark from the sea side—27

fathoms long, and from the other three sides 50 fathoms long. In the fortress are the following structures: a fairly clean light barracks made of boards, banked up with sod, 7 fathoms long and four fathoms wide with eleven bunks for Russian promishleni, an apartment for bidarstebik and above two summer apartments, entrance hall, kitchen, a balagan 8 fathoms long by four fathoms wide. Here in good seasons are prepared up to 300,000 yukola. There are two barabaras, one for food stuffs of which there were 200 baskets sarana, 20 barrels shiksha of 25 vedros each, three vats whale oil and two barrels moroshka, the other barabara for storing various articles; a cellar for potatoes and turnips, a summer kitchen, bath-house, a shed for work, and watch-house; beyond the fortress not far from the gate, a cattle barn, hayloft, pig pen, a square kazhim with a hut of three fathoms long for the laborers, of which there are at this artel 20 males and 18 female laborers besides 25 women for cleaning fish, gathered from various settlements. At the foothill, a shed for bidaraks and bidarkas.

Besides these Kadiak artels there are two on Afognak island with similar buildings and establishments; there is one artel on Woody island where no yukola is prepared because there is not a stream there. On this little island they make bricks and boil out salt. At each of the artels they have cattle and vegetable gardens, where they plant potatoes and turnips.

DEPARTMENT OF THE INTERIOR, CENSUS OFFICE, REPORT ON
POPULATION AND RESOURCES OF ALASKA AT THE ELEVENTH
CENSUS: 1890, G. P. O. 1893. PAGE 79.

THE SECOND DISTRICT.

The Karluk river became known to the Russians as the most prolific salmon stream at an early date, and they utilized it as a depot for supplying their numerous hunting parties with dry fish as early as 1793. Ever since that time that wonderful little river has been made to yield its annual quota for the subsistence of Alaskan people. Salting salmon was not begun here until the middle of the present century, and then only for local supply. With the advent of the Americans the salting of Karluk salmon for the market began upon a limited scale at first, and it was only within the last decade that the California capitalists had

their eyes opened as to the possibilities of this industry, and that canneries were erected, of which there are now 5 upon the narrow gravel spit which separates the river from the bay for half a mile. Each of these canneries is fitted with the latest improvements in appliances and machinery, and each can put up from 40,000 to 50,000 cases in a season. During the season of 1890, when the fishermen at Karluk were paid a bonus on each fish caught, the accounts footed up considerably over 3,000,000 fish. The season or "run" extends from June until the beginning of September, but it is interrupted at various times by "slack intervals", lasting from 1 to 2 weeks.

In 1890 the fishing gangs of these 5 canneries were increased by others from the Arctic Packing Company at Uyak and from the Royal and Russian-American Packing Companies of Afognak, and during that whole season nearly 1,000 fishermen, in gangs of 24, could be seen lounging on the beach awaiting their turn to haul the seines, which was determined by lot. Since that time all the Karluk canneries and those of Alitak, Uyak, and Afognak have formed a combination, and have agreed to jointly employ 160 fishermen at Karluk, the fish to be divided pro rata among the firms. Steam tenders carry the fish from all outlying stations to Karluk.

The population of the place in 1890 was over 1,100, but only 180 of these were creoles and Eskimo, permanent residents of the village. A majority of the males and many of the females among the permanent residents are employed in the canneries as fishermen or fish cleaners, receiving good wages. During the winter considerable trapping is done for foxes and land otters, and altogether the Karluk people may be described as fairly prosperous.

The buildings belonging to the fishing firms quite cover the gravel spit referred to above, presenting a very respectable appearance. Each firm has its superintendent's residence, mess house, bunk house, blacksmith and carpenter shop, Chinese quarters, cannery proper, warehouse, cooper and boxmaker shop, and many also a trading store, while both bay and beach are fairly covered with steam launches, fishing dories, lighters, and boats of all kinds. Farther offshore moorings are laid down for the larger craft, the ships, barks, and steamers which carry the pack to San Francisco, and lastly quite a fleet of steam tenders for local traffic. In the height of the season "Karluk spit", as the fishermen call the place, and the roadstead and strait

adjoining, present a scene of the greatest activity and animation.

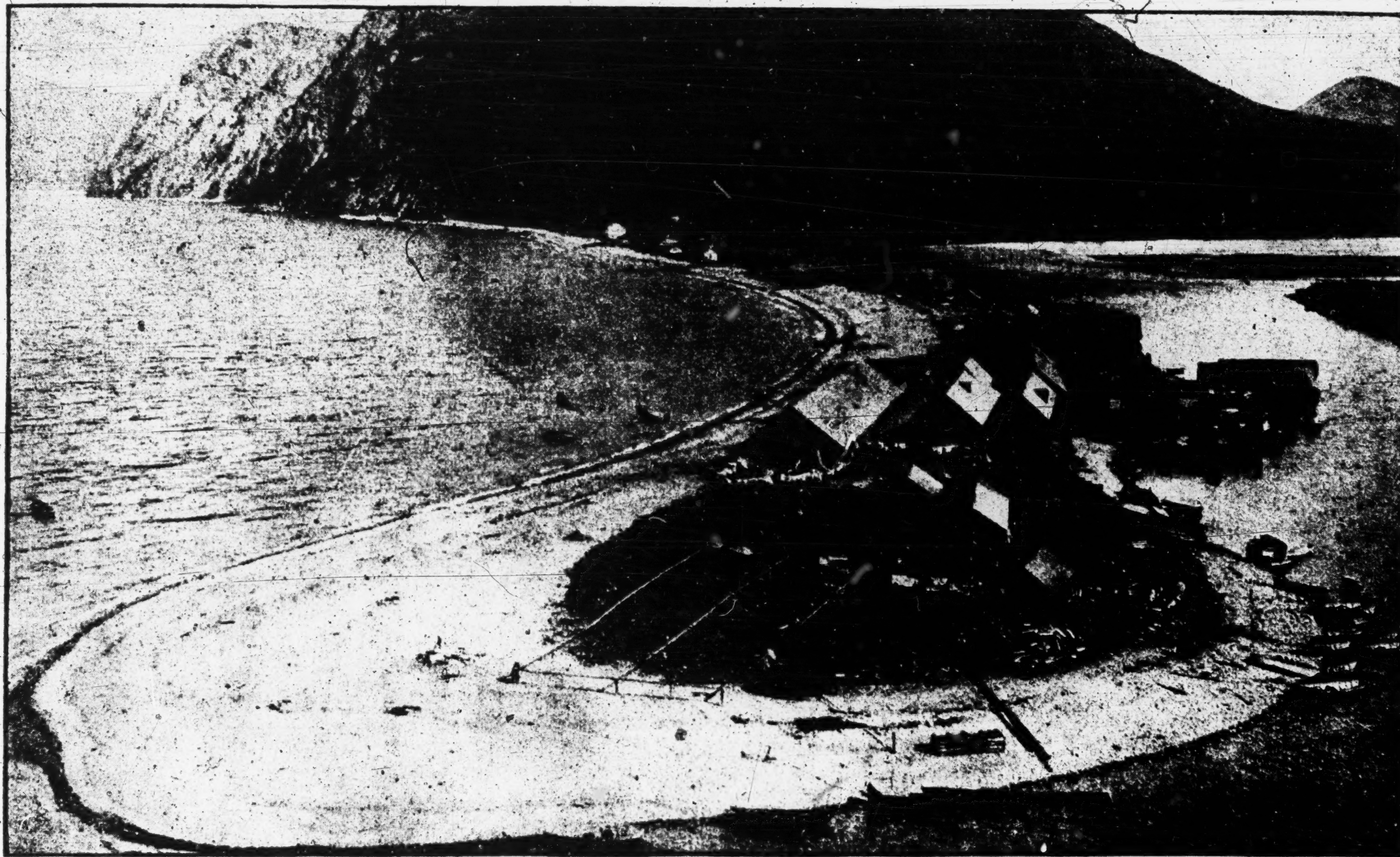
The native settlement is now confined to the left bank of the river, opposite the canneries. It consists chiefly of "barabaras" or sod huts, but owing to the prosperous condition of the people the interior of these humble homes present the comforts and many of the luxuries of a more civilized existence. Upon the bluff overhanging the village stands a neat little chapel of the Russian church, erected by the people, and not far from it the United States government has built a handsome schoolhouse and teacher's residence.

Indications of precious minerals have been reported at various points in the vicinity of Karluk, but as far as known no steps have thus far been taken to develop any of the deposits.

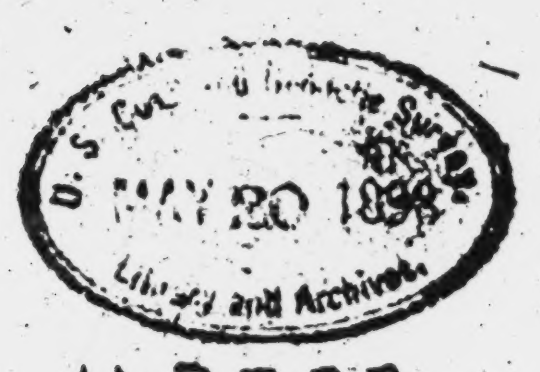
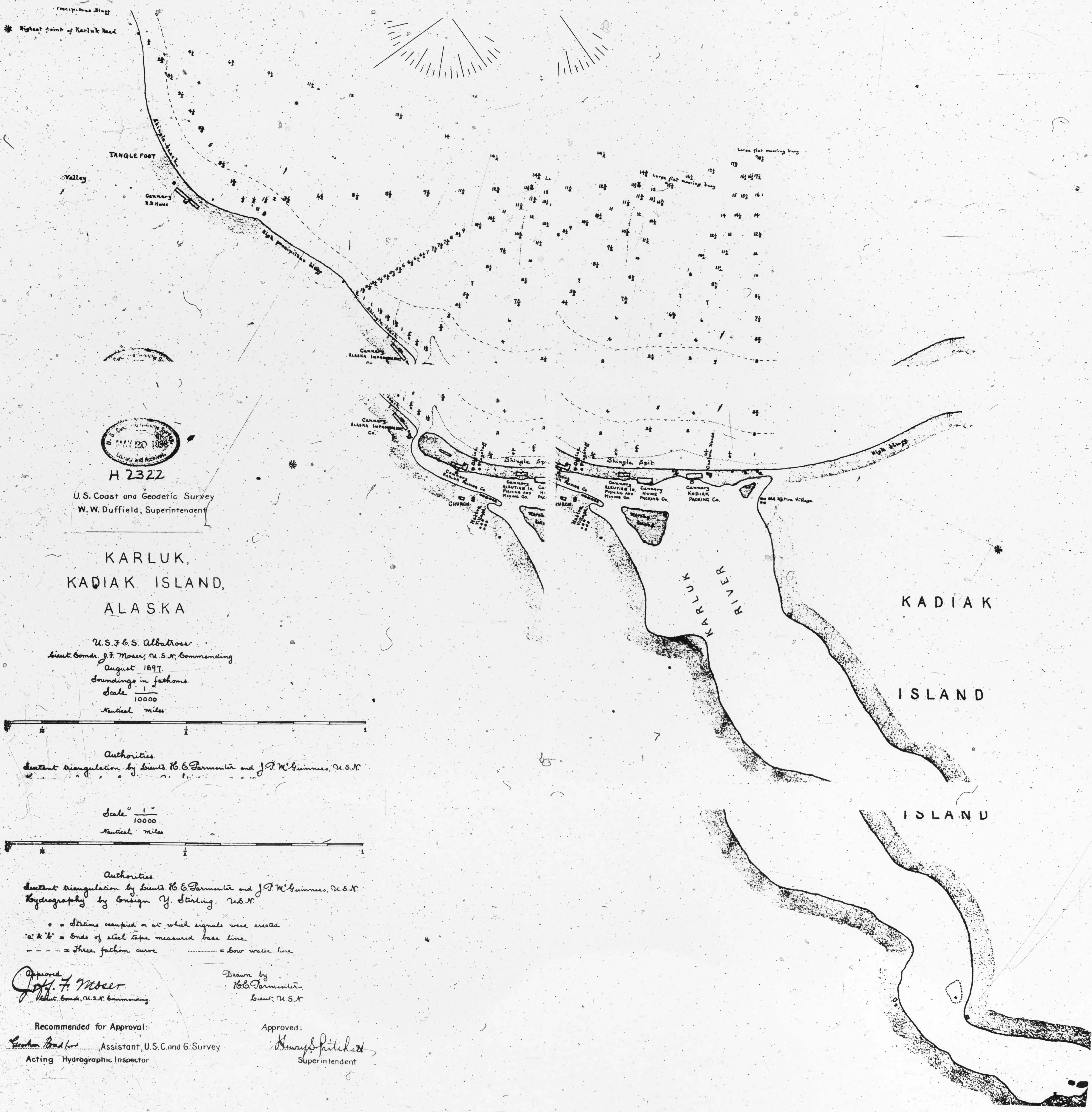
POPULATION AND RESOURCES OF ALASKA AT THE ELEVENTH CENSUS, 1890.

SECOND OR KADIAK DISTRICT

Villages	Total	Male	Female	Native	Foreign	Race and Color											
						White		Mixed		Indian		Mongolian		All Other			
						Total	Male	Female	Total	Male	Female	Total	Male	Female	Total	Male	Female
The district	6112	4398	1714	2294	3818	1105	1056	49	784	407	377	2782	1494	1288	1433	1433	8 8
Karluk	1123	1034	89	162	961	391	391		20	12	8	167	86	81	542	542	3 3



KARLUK SPIT.



H 2322

U.S. Coast and Geodetic Survey
W.W. Duffield, Superintendent

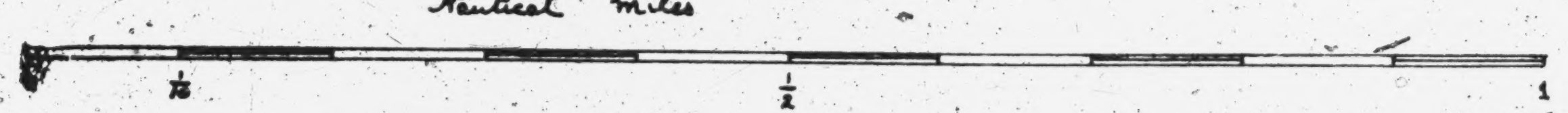
KARLUK, KADIAK ISLAND, ALASKA

U.S.F.C.S. Albatross
Lieut. Comdr. J.F. Moser, U.S.N., Commanding
August 1897.
Soundings in fathoms
Scale $\frac{1}{10000}$
Nautical miles



Authorities
Sextant triangulation by Lieuts. H.C. Parmenter and J.P. McGuinness, U.S.N.
Hydrography by Ensign Y. Stirling, U.S.N.

Scale $\frac{1}{10000}$
Nautical miles



Authorities
Sextant triangulation by Lieuts. H.C. Parmenter and J.P. McGuinness, U.S.N.
Hydrography by Ensign Y. Stirling, U.S.N.

o = Stations occupied or at which signals were erected
a & b = Ends of steel tape measured base line
--- = Three fathom curve

Approved
J.F. Moser
Lieut. Comdr., U.S.N., Commanding

Drawn by
H.C. Parmenter
Lieut., U.S.N.

Recommended for Approval:
Ethan B. ... Assistant, U.S.C. and G. Survey
Acting Hydrographic Inspector

Approved:
Henry P. ...
Superintendent

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1948

No. 24.

**FRANK HYNES, REGIONAL DIRECTOR, FISH AND WILDLIFE
SERVICE, DEPARTMENT OF THE INTERIOR, *Petitioner,***

v.

**GRIMES PACKING CO., KADIAK FISHERIES COMPANY, LIBBY,
MCNEILL & LIBBY, FRANK MCCONAGHY & CO., INC.,
PARKS CANNING CO., INC., SAN JUAN FISHING &
PACKING CO., AND UGANIK FISHERIES, INC.**

**On Writ of Certiorari to the United States Court of Appeals
for the Ninth Circuit.**

BRIEF OF AMICI CURIAE:

**Native Village of Karluk,
Alaska Native Brotherhood,
National Congress of American Indians,
Association on American Indian Affairs, and
American Civil Liberties Union.**

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American Civil Liberties Union.

PRELIMINARY STATEMENT.

The Native Village of Karluk is a community of Aleuts now numbering approximately 200¹ which has drawn its principal sustenance, for many centuries, from the lagoon

¹ See *infra*, p. 26. And see Office of Indian Affairs, *Tribal Relations Pamphlet 1B*, September 1, 1946, p. 9. An undetermined number of other Kodiak Natives reside at Karluk during the fishing season.

or harbor which the village borders. This lagoon comprises one of the most prized native fisheries in Alaska, since the water is shallow enough to permit the taking of fish by simple and inexpensive gear operated from the beach by the natives.

When Russia ceded Alaska to the United States the property rights of the Karluk Natives were safeguarded by a clause of the treaty of cession in which the United States undertook to protect these natives in the enjoyment of their property.² That promise the Government has tried faithfully to perform. In the First Alaska Organic Act of May 17, 1884 (23 Stat. 24), the United States protected the Alaskan natives "in the possession of any lands actually in their use or occupation or now claimed by them." This protection was repeated in the Act of March 3, 1891 (26 Stat. 1101). The reservations thus accomplished in 1884 and 1891, though vague and indefinite in scope, served their purpose for some decades, since there were very few non-Indians in Alaska to raise questions about the boundaries of lands that natives used or occupied or claimed. In recent years the need for a more specific definition of native land holdings became pressing. Finally by the Act of May 1, 1936 (49 Stat. 1250, 48 U. S. C. sec. 358a) the Congress authorized the Secretary of the Interior to designate and define, by metes and bounds, the areas which had been or should be reserved for native use. The chief purpose of the 1936 Act was said to be to fulfill the nation's "moral and legal obligations in the protection of the economic rights of the Alaska natives" (H. Rep. No. 2244, 74th Cong., 2d Sess., p. 3; S. Rep. No. 1748, 74th Cong., 2d Sess., p. 3). The legal obligation was traced to the Act of 1884, and the Congressional Committees reporting the 1936 legislation pointed

² The Aleuts, as Christian subjects of the Czar, were protected by Clause 3 of the Alaskan Treaty of Cession of 1867, which pledged that they should be "maintained and protected in the free enjoyment of their rights, property and religion." 15 Stat. 539.

Government that this Act included submerged lands as well as dry lands, that such was the intention of Congress and the understanding of administrators and Indians alike, and that a contrary interpretation would fly in the face of a long and consistent history of legislation, executive action, and court adjudication. Petitioners seek only to supplement the Government's brief on this point by calling this Court's attention to the factual and legislative history and context of the 1936 Act.

3. The Interpretation of the White Act of 1924.

Again, the petitioners herein have no fault to find with the arguments of the Government brief on the interpretation of the White Act. We agree that an act passed in 1924 could not possibly repeal or limit the 1936 Act. We agree that the White Act was not intended to limit the establishment of native reserves. We agree that the specific application of the White Act at Karluk will aid in the conservation of Alaska's rapidly diminishing fishery resources as well as in the conservation of its even more limited human resources. We wish only to add to the excellent presentation of the Government's brief on this issue a commentary on the factual background of this issue. We think that an appraisal of the legal issues centering about the White Act can be more realistic and more just if it takes account of the present-day actualities of commercial fishing on the maritime public domain of Alaska.

ARGUMENT.

Point I.

The Circumstances Under Which This Suit Was Instituted Illustrate the Impropriety of Litigating Title in the Absence of the Only Title Claimants.

What actually happened in this case may have some bearing upon the question of proper parties. The case was arranged by the plaintiff companies, who sought to establish jurisdiction for a suit in Alaska by having the nominal defendant threaten to arrest all fishermen who were fishing for the companies (R. 72-75, 77-78, 134, 168, 332, 335, 400, 449-451). While statements were made by the defendant (R. 460, 133-134, 449-453, 72-79) which the trial court construed as amounting to threats of wholesale arrests (R. 34), these statements were explicitly disavowed by the Department of the Interior, on the advice of the Department of Justice, before the institution of this suit. (R. 459) In fact, the threat was an empty gesture, so understood by all concerned, since all fishermen had complied with the very modest licensing system established by the Native Village of Karluk as authorized by the Secretary of the Interior (R. 128, 189, 191, 412-413). This threat of wholesale arrests was calculated: (a) to make the Indian position look as unreasonable as possible and (b) to make it as difficult as possible for the Indians, the Commissioner of Indian Affairs; or the Secretary of the Interior to appear in court (600 miles from the Karluk Reservation⁶ and 5,000 miles from Washington) for the

⁶ Neither plaintiffs nor defendant claim title here, yet plaintiffs seek an adjudication that equitable title to the Karluk Lagoon is in the United States which does not claim it, and not in the Village of Karluk, which does; and they seek such adjudication in a suit to which neither the United States, the undoubted legal owner, nor the Village, which claims to be the equitable owner, is a party litigant.

⁶ The bare statement of mileage does not make clear the difficulties of travel. In fact, of the two Government officials most familiar with the facts of this case, one was drowned off the Kodiak coast and the second was unable to reach court in time to testify. The trial court refused to grant a continuance to permit such testimony. (R. 89-93)

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out that it "in reality carries out the promise of this Government contained in its act approved on May 17, 1884" (*Ibid.*). The moral obligation has its origin in the pledges made by the United States in the Treaty of 1867.

In 1943 this long drawn out process of definition, recognition and confirmation of native possessions was completed for the Karluk Natives by the issuance of Public Land Order No. 128 (8 F. R. 8557). The validity of that Order has now been challenged. The issue in this case involves the good faith of the United States in the performance of the conditions upon which it received the Territory of Alaska. It involves also the continued existence of a community of natives who face the seizure of their chief source of livelihood.

The Native Village of Karluk, a municipal corporation,³ was not made a party to the present suit, which was brought by the plaintiff canning companies against a local official of the Fish and Wildlife Service. The municipality seeks an opportunity now, for the first time, to present for judicial consideration the nature of its interest in the lands which are the subject of this suit. On September 27, 1948, the Acting Commissioner of Indian Affairs approved the selection by the Native Village of Karluk of the attorneys who are submitting this brief.

The other organizations which join in this brief are concerned that the United States shall not deal unjustly with a poor and helpless community of natives who see themselves deprived of their chief source of livelihood. The organizations submitting this brief are also concerned with the precedent which this seizure may set for other and further assaults upon the possessions of Alaskan Natives, who are

³ Incorporated as a municipal corporation under section 17 of the Act of June 18, 1934 (48 Stat. 984, 987, 25 U. S. C. sec. 477) and section 1 of the Act of May 1, 1936 (49 Stat. 1250, 48 U. S. C. sec. 362), and subject to suit as such (Charter of Native Village of Karluk, ratified August 23, 1939, section 4).

being systematically impoverished and decimated.⁴ But above all, they are concerned that the United States shall maintain good faith in the eyes of the world in discharging its obligations to the most helpless of its minorities. They are shocked at the implications that may be drawn from the statement of the Circuit Court of Appeals in this case that "The American way of the profit motive often leaves unjustly behind minority groups of lesser education and initiative." (R. 511.) They believe that it is the highest function of our courts to see that justice is done even to minority groups of lesser education and initiative. What is at stake in this case is not an ancient wrong to ancestors of those who now seek redress; it is a present assault, recently initiated and not yet fully consummated, against the basic human rights of the Karluk Natives who seek the protection of this Honorable Court.

THE ISSUES.

The strictly legal issues in this case have been lucidly presented in the brief of the Government. The *amici curiae* herein endorse that brief in its entirety. The purpose of

⁴ "The reservations heretofore established and the proposed reservations are in areas occupied and used by the natives and their ancestors since time immemorial. These lands constitute the economic bases for native life. The exploitation and spoliation of some of the ancestral hunting, fishing and trapping grounds of the natives by non-natives have already worked a hardship on many of the native groups and seriously jeopardized their economic situation. Unless the natives are protected in their occupancy and use of these ancestral areas and are permitted to establish their local governments, the virtual destruction of these people is almost sure to result." Report of Secretary Krug on S. J. Res. 162, dated February 18, 1948. Hearings before Subcommittee of Sen. Comm. on Interior and Insular Affairs, 80th Cong., 2d sess., on S. J. Res. 162, p. 3. "Medical Conditions in Alaska," *American Medical Association Journal*, October 25, 1947, pp. 501-503, reports a tuberculosis death rate among Alaska natives 23 times as great as that for the general population of the United States.

purpose of explaining the reasons for the reservation. An affidavit signed by the Under Secretary of the Interior on July 3, 1946, explaining the reasons for the Karluk Reservation and the circumstances leading to its establishment was excluded from the record by a ruling of the trial court excluding affidavits and by the holding that since all reservations of submerged lands are unlawful, the reasonableness of any particular reservation was not properly in issue.

The result is that the record is not as satisfactory as might be desired with respect to the facts showing prior use and occupancy of the land in question and the cannery companies' practice of forcefully removing the Karluk natives from their beaches to a nearby "rock dump", which was the immediate occasion of the reservation proclamation. Over the Government's repeated objections (R. 72-89), the plaintiffs succeeded in conveying to the trial court and the Circuit Court a distorted picture of the facts and the issues.

These considerations lend special significance to the Government's argument that the court below was without jurisdiction to declare the Karluk reservation of submerged lands invalid (R. 39), even if it had jurisdiction to enjoin the threats of arrest which plaintiffs themselves induced the nominal defendant to make.

⁷ It is submitted that the Under Secretary's affidavit is a public record relevant to the issues in this case, and it is accordingly set forth, for the information of the Court, in an appendix to this brief. See p. 23, *infra*.

⁸ Not only are the supposed "facts" of the instant case,—the "threat of wholesale arrests," the alleged long-continued use of the native beach seining area by the plaintiff companies, and their alleged dependence upon fish caught within that area—pure fabrications, but the history of Karluk and of the Alaskan Natives generally which the plaintiffs advanced in the courts below is equally fictional. The most important fact that is distorted is the fact that, at least since 1884, occupancy of beaches and bays by white or native fishermen or groups or companies has been recognized and generally respected. Thus practically every Indian reservation in

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CASES:

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Act of May 1, 1936, 49 Stat. 1250, 48 U.S.C. secs. 358a, 362	2, 3, 5, 6, 9, 11, 12, 13, 14
Act of August 28, 1937, 50 Stat. 862, 25 U.S.C. 463 (b)(3)	12
Alaskan Treaty of Cession of 1867, 15 Stat. 539	2, 3, 19

Point II.

The Factual and Legislative Context of the 1936 Act Emphasizes the Absurdity of an Interpretation of That Act Which Limits "Land" or "Public Land" to "Dry Land."

The basic substantive question in the case at bar is the question of the meaning of the Act of May 1, 1936 (49 Stat. 1250, 48 U. S. C. sec. 358a).

The Government's brief contains an accurate and illuminating account of the legislative history and administrative construction of the 1936 Act. Additional light, however, may be thrown upon the meaning of the 1936 Act if it be noted that the 1936 Act was an amendment to the so-called "Wheeler-Howard Act" of June 18, 1934 (48 Stat. 984, 25 U. S. C., sec. 461, et seq.). The 1934 Act thus furnishes the legislative context in which the Alaskan reservation provision here in question can be most fairly construed.

The Wheeler-Howard Act of 1934 was an attempt to help Indians to help themselves to a more adequate standard of living. To this end it did three things: (1) it provided that Indians should have increased control of their own reservation resources; (2) it authorized the protection and expansion of the Indian resource base, and (3) it sought to direct the nation's considerable expenditures for Indian welfare to such productive purposes as the purchase of land, and

Alaska (of which about 120 were established between 1890 and 1936) included water areas, although in only a few of these, such as Tyonek, Amaknak, Chilkat, Hydaburg, and Adnette Island, does the verbal description of the reservation make it clear that ocean waters are included. The idea of a fishermen's reservation that does not dip below the line of high tide, or even the line of low tide, is an economic and historical absurdity. Equally absurd is the idea that Karluk is the only place where beaches and harbors are exclusively occupied or "monopolized" by the adjacent land owners or first occupants,—a point discussed more fully *infra*, under Point III.

the instant brief of *amici curiae* is primarily to assist this Court in exploring the factual, legislative and administrative context of the issues before it and in appraising the facts that bear on social policy or value judgments which are implicit in those issues.

This case raises three principal issues: (1) a preliminary question of jurisdiction; (2) a substantive question of the proper interpretation of the provision of the Act of May 1, 1936 (49 Stat. 1250, 48 U. S. C. sec. 358a) authorizing the proclamation of native reservations in Alaska, and (3) a subsidiary question of the statutory interpretation of the "equality" proviso of the White Act of June 6, 1924 (43 Stat. 464, 48 U. S. C. secs. 221 et seq.) governing fishing reservations in Alaska. Each of these issues may be clarified by reference to the factual background out of which the issues emerge.

1. The Question of Jurisdiction.

The chief jurisdictional question in this case is the question whether, when the United States asserts that it holds certain tidelands and submerged lands in trust for a Native Community of Aleuts, third parties may properly challenge that assertion, by bringing suit against a friendly government employee who has nothing to do with the assertion or administration of that trust, without the United States or the responsible Federal official (in this case the Secretary of the Interior) or the beneficiaries of the trust being parties to the litigation.

The actual circumstances under which this suit was brought, which have been politely passed over heretofore in the briefs of the Government and the plaintiff companies, indicate the unwisdom of litigating questions of Federal or Indian title in this manner.

2. The Interpretation of the 1936 Act.

On the substantive side of the case the fundamental question is that of the proper interpretation of the Act of May 1, 1936. Petitioners agree with the argument of the

MISCELLANEOUS:

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Cohen, F. S., <i>Handbook of Federal Indian Law</i> (1945)	10, 12
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Hearings before Subcom. of Com. on Interstate and Foreign Commerce, U. S. Sen. and Subcom. of Com. on Merchant Marine and Fisheries, H. R., 80th Cong., 2d sess., on S. 1446 and H. R. 3859, pp. 27, 37-38, 53, 106	20
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Kroeber, A., <i>Cultural and Natural Areas of Native North America</i> , p. 167	12
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Office of Indian Affairs, <i>Tribal Relations Pamphlet 1B</i> , September 1, 1946, p. 9	1
Public Land Order No. 128 (8 F. R. 8557)	3, 16
Report of Board of Indian Commissioners, July 30, 1885	15
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with reference to the Alaska native rights and needs may indeed be a sobering guide to the future disposal of the remaining unpreempted resources to which the natives may have color of title, actual title or need.

"* * * The obligation remains to afford these Indians, that which they had, an opportunity to envision a stabilized and assured continuance.

"As pointed out above, this can be gained by securing today certain rights to fishing areas, to fish trap sites, to water power, to garden plots, to mineral resources, to logging areas, by giving protection against 'China System' and contract labor or financial encouragement in the form of reimbursable loans for the erection of canneries. This program is largely legislative; of a regulatory and budgetary nature. * * *,¹⁵

The 1936 Alaska Act was evolved as a part of this proposed program.

Plaintiff companies are asking the courts to overrule the decision of the legislative and executive arm of the government that the best public use that can be made of the Karluk beach and harbor is to reserve it for the use of Karluk Village. They advance in support of this contention no facts of significance other than the amount of their investments and the size of their financial hopes.

4. *Historical Background*

While the Wheeler-Howard Act of 1934 itself furnishes the best guide to the interpretation of its 1936 amendment, the fact that this 1936 amendment incorporates by reference two earlier acts of 1884 and 1891 makes the historical interpretation of their reservation provisions a relevant guide in the interpretation of the 1936 Act. Both these acts have been consistently interpreted by the judicial and executive

¹⁵ Memorandum of Paul W. Gordon, Director of Education for Alaska, dated March 16, 1934, approved by Commissioner of Indian Affairs, June 8, 1934, transmitted to House Committee on Indian Affairs, with the endorsement of the Secretary of Interior, on March 8, 1935, for consideration in connection with the then-pending Tlingit-Haida Jurisdictional Act of June 19, 1935, 49 Stat. 388.

branches of government as covering submerged lands as well as uplands. *Sutter v. Heckman*; 119 Fed. 83; *Johnson v. Pacific Coast S. S. Co.*; 2 Alaska 224; *Miller v. United States*, 159 F(2d) 997; 24 L. D. 312; 49 L. D. 592; 57 I. D. 461.

When the 1884 act was passed, the committee chairman sponsoring the legislation declared:

"It was the object of the committee absolutely to save the rights of all occupying Indians in that Territory until the report which is provided for in another section of the bill could be made, when the Secretary of the Interior could ascertain what their claims were and could definitely define any reservations that were necessary to be set apart for their use". (15 Cong. Rec. 531)

A report made on July 30, 1885, by the Board of Indian Commissioners, pursuant to section 12 of the 1884 act, contained this recommendation:

"The fisheries occupied by them (natives) before the advent of the whites should also be secured to them against encroachment."

This Court is familiar with the fact that guaranties of Indian fishing rights and the protection of such rights against white encroachment formed a standard feature of our early dealings with Indians, *Sampson Tulee v. State of Washington*, 315 U. S. 681; *United States v. Winans*, 198 U. S. 371; just as similar protection of native fishing rights characterized our dealings with Hawaii, *Damon v. Hawaii*, 194 U. S. 154; *Carter v. Hawaii*, 200 U. S. 255. What was said of the Pyramid Lake Reservation in Nevada in *United States v. Sturgeon*, 27 Fed. Cas. No. 16413 is relevant to the case at bar:

"It is plain that nothing of value to the Indians will be left of their reservation if all the whites who choose may resort there to fish. In my judgment, those who thus encroach on the reservation and fishing ground violate the order setting it apart for the use of the Indians, and consequently do so contrary to law."

infringe on native possessions.¹⁷ Although the United States never made a treaty with the Karluk Natives, it did make a treaty in 1867 with their sovereign, the Czar of Russia, who was humane enough to insist that the property rights of these and other civilized natives should be protected.

The pledge of the Government of the United States to protect the property rights of the Karluk Natives has been faithfully honored by the Congress and the Executive. The question in this case is whether fulfillment of that international obligation may be enjoined by the courts at the suit of persons who quite conceivably may make larger profits if the United States forgets its treaty obligations to the original inhabitants of Alaska but who have no other interest in the subject matter of this suit.

This case does not involve the issue raised in *Alcea Band of Tillamooks v. United States*, 329 U. S. 40, as to whether the land rights of the Karluk Natives are of such a character as will ground a suit against the Government for failure to respect and protect those rights. Here the Government has done its best to protect those rights for 81 years, from the signing of the treaty of cession in 1867 to the filing of the Government brief in this case in 1948. The only question is whether the land right or land claim of the Karluk Indians is such that the Government of the United States may recognize it and protect it from interference. Such protection is not discrimination in any invidious sense. The

¹⁷ The Ukase of March 5, 1841 provides:

“Sec. 282. Should the Colonial Administration consider it advantageous to establish factories, redoubts, or so-called ‘one-man posts’ in various parts of the American continent, for the safeguarding of its commercial interests, it shall obtain the consent of the natives to such action, using every endeavor to preserve pacific relations with them and to avoid arousing the suspicion of any desire to encroach on their liberty.” (Ukase of March 5, 1841, translated by R. H. Geoghegan.)

the establishment of credit facilities for economic development of reservation resources.⁹

Each of these provisions was extended, with minor modifications, to Alaska, and the Alaskan modifications of this Act can hardly be understood without reference to the Act's general provisions.

1. *Defining Reservations.*

Giving the Indians increased control of reservation lands¹⁰ made it necessary to define more clearly existing Indian reservation boundaries. Whether a piece of land, dry or submerged, was or was not part of an Indian reservation was a question of little importance so long as the Government felt free to change Indian reservation boundaries, from time to time, to meet the needs of white settlers,¹¹ or even hostile tribes.¹² Indian reservations were often left in prudent obscurity, not only in Alaska, under the Acts of May 17, 1884, and March 3, 1891, but even in Continental United States, and it was necessary for this Court in 1938 to look carefully into the legislative history of appropriation acts to determine whether a tract of land in Nevada really was an Indian reservation.¹³

Section 7 of the Wheeler-Howard Act of 1934 (25 U. S. C. sec. 467) sought to diminish this obscurity by authorizing the Secretary of the Interior, under certain circumstances,

⁹ The purposes and legislative history of this act are sketched in F. S. Cohen, *Handbook of Federal Indian Law* (1945) pp. 84-86, and the extension of the act to Alaska is discussed at pp. 413 and 415 fn. 216.

¹⁰ This was particularly a consequence of section 16 of the Act of June 18, 1934, 48 Stat. 984, 986, 25 U. S. C. sec. 476, which gave organized Indian councils control of the disposition of Indian tribal lands and other tribal property.

¹¹ See *Ute Indians v. United States*, 330 U. S. 169.

¹² See *United States v. Shoshone Tribe*, 304 U. S. 171.

¹³ *United States v. McGowan*, 302 U. S. 535.

to issue proclamations defining reservation boundaries that would otherwise be obscure. Section 1, of the Act of May 1, 1936, extended this section to Alaska, and section 2 of the 1936 Act supplemented this provision by giving the Secretary of the Interior a wide discretion in the definition of Indian reservations in Alaska. Foreseeing that an authority merely to mark out existing reservations would subject every such demarcation to attack in the court, where the question whether any particular demarcation went beyond the previously existing reservation could be endlessly litigated, the drafters of the 1936 Act expressly provided that if the Secretary went beyond existing reservations and included any part of the public domain, whether by mistake or through prudent generosity, this should not invalidate the reservation so proclaimed. That is why, after specifying the various existing reservations which the Secretary of the Interior was authorized to confirm to native occupants, the 1936 Act carries the catch-all phrase:

“together with additional public lands adjacent thereto, within the Territory of Alaska.”

The word “public” was used to assure miners, homesteaders, and other private claimants that their rights would not be disturbed. But except for this limitation and the limitation that he must not go beyond the Territory of Alaska, the Secretary of the Interior was given a very broad discretion. If he defined a reservation too narrowly, the Indians had no legal redress,—except by going to Congress for new legislation; if he defined it too broadly, the Indians’ neighbors had no redress except by doing the same.

2. *Expanding Reservations.*

The Wheeler-Howard Act provided not only for the proclamation of continental Indian reservations but also for the addition of considerable areas of public domain and private land to existing Indian reservations. (There is no truth in the statement of the plaintiff companies (Br. in

Opp., p. 19) that the Wheeler-Howard Act "conferred no power to create reservations.") In continental United States millions of acres of "surplus" Indian lands left over after completion of the allotment process had been made part of the public domain but not yet paid for, the Indians being entitled to receive the proceeds from this land as it was disposed of. Section 3 of the Wheeler-Howard Act (25 U. S. Code sec. 463) gave the Secretary of the Interior the widest possible discretion to restore any or all of this vast domain to Indian ownership and reservation status.¹⁴ This section could not have much, if any, application in Alaska, where Indian lands never had been allotted, but section 2 of the 1936 Act gave the Secretary a broad power to add public domain to Indian reservations similar to the power given the Secretary in the States by section 3 of the Wheeler-Howard Act of 1934. The provisions of section 3 clearly applied to lands under water, as well as to uplands, as is shown not only by the restoration of many water areas to Indian reservations, through administrative action under that section, but also by the fact that Congress in 1937 referred expressly to "water reservoirs" and "water rights" on the Papago Reservation in connection with the reference in section 3 to "lands . . . opened to sale . . . by any of the public-land laws." (Act of August 28, 1937, 50 Stat. 862, 25 U. S. C. 463(b)(3).)

A fortiori, if section 3 of the 1934 Act was not limited to dry land in the States, its Alaskan analogue, section 2 of the 1936 Act, cannot reasonably be limited to dry land in Alaska, where the beneficiaries of the legislation are almost without exception fishermen, whose life centers on the line where land and water meet. See Kroeber, *Cultural and Natural Areas of Native North America*, p. 167.

3. *Aiding the Native Economy.*

Section 5 of the Wheeler-Howard Act of 1934 authorized the purchase, with Federal funds, of private lands for Indian use. In Alaska, where more than 99% of all land was

¹⁴ Op. cit. note 9, pp. 84, 334-336.

still in Federal ownership, it was not necessary to dip into the public treasury to secure additions to the Indian resource base: such additions could be made directly out of the public domain. Congress clearly intended to help Alaskan native fishermen by assuring them of "land along the coast with fishing rights." (Hearings before H. R. Comm. on Ind. Affairs, 73d Cong., 2d sess., on H. R. 7902, p. 76).

The Congress that adopted the 1936 Act was familiar with the needs of the native coastal economy. Its Committees on Indian Affairs had received a document from the Department of the Interior, in connection with a related pending bill, which made the following observations on the liquid character of the native economy:

"Breoccupied with land problems, as they present themselves on the continental United States, our reflections may attach themselves entirely too much with the occupation and use of land itself. Just as in arid United States water rights may be of more value than the real estate under question, so in southeastern Alaska fishing rights in waters adjacent to certain lands may be of more value than the lands.

"* * * But perhaps even more important, since their life was based largely on the salmon catch, the natives of southeastern Alaska had a well-defined recognition of the rights of individuals and families to the use of certain streams, channels and ocean areas for fish-taking. These locations were honored just as faithfully as if the sites were patented and recorded with a clerk of records. This system may be seen still operating on the Kuskokwim where without recourse to written records but with great fidelity to the dictates of custom, enforced by unwritten community decree, fish net locations are considered as belonging to a certain person, subject to disposal by deed or testament.

"* * * Let me conclude then, as water is to irrigated land, fishing rights are to an Alaskan village site and as such have value greater than the site itself. The fishing fields are the harvest fields.

"* * * A record sharply brought before us of our possible derelictions or lack of foresight in the past

Point III.

The Protection Which the Federal Government Has Sought to Extend to the Village of Karluk Under the White Act is Not a Violation of the Equality Proviso of That Act; Similar Protection Has Been Consistently Extended to Plaintiffs and Other Non-Indian Claimants of Possessory Rights in Alaskan Fisheries.

Plaintiffs in this case have sought to present the issue as if it were one of discrimination against white men or white corporations. But this is not a case where the United States has taken a fishery from white men and given it to Indians as a matter of charity, and we do not here address ourselves to the question how such a case should be decided.

The distinction that the Congress and the Secretary of the Interior drew between the plaintiff companies and the Karluk Natives was not a racial distinction but a distinction between trespassers and property owners. It is exactly the same sort of distinction that the plaintiff companies insist upon when they bar trespassers from their cannery grounds or from trap fishing within a mile of their traps. (See, for example, Alaska Commercial Fishery Regulations, 1946, sec. 208.21).

The basic fact which the plaintiffs consistently ignore is that fishing from beaches and tidelands in Alaska is never open to all-comers at all times and could not be without endless confusion and violence. The man who has his gear on the beach first has a prior right and a right to exclude others from interference with his operations. Regularly the Government, under the White Act, has tried to protect beach gear operations from interference. The area of 3000 feet from shore, used in the challenged Public Land Order No. 128, was administratively fixed and judicially approved, as the area of water in which beach operations must be assured of freedom from interference if they are to be successful. *Alaska Pacific Fisheries Co. v. United States*, 248 U.S. 78. The progress of the Annette Islanders, under that decision, inspired the legislation and the Executive Order

which are here challenged. Hearings before H. R. Comm. on Indian Affairs, 73d Cong., 2d sess., on H. R. 7902, p. 498.

Literally construed, as the plaintiff companies would have us construe the clause in this case, the equality proviso of the White Act would mean that a white man had the same rights on the Karluk beach as a member of the Village. But by the same literal construction, the Natives of Karluk could not be excluded from the canneries, oyster beds, or trap sites occupied by the plaintiff companies and other canning companies on the Alaskan coast. For the equality proviso applies to the right to "prepare, cure, or preserve," as well as the right to "take" fish or shellfish. And if this proviso be literally construed, no citizen of the United States could be excluded from preparing, curing, or preserving fish in the plaintiff companies' boats and canneries, or from taking fish from within the plaintiff companies' fish traps.

What all this indicates is that, as Judge Rutledge clearly recognized in his lucid opinion in *Dow v. Ickes*, 123 F(2d) 909, cert. den., 315 U. S. 807, the equality proviso of the White Act should not be literally construed, but should be understood as consistent with administrative distinctions based, in good faith (even if that good faith be ill-advised), upon priority of use, priority of application, or other relevant social considerations. The Alaska Commercial Fishery Regulations for 1946 contain numerous provisions in line with the suggestions of that opinion. See, particularly, sections 201.21b, 201.23, 201.24, and 201.25.

The real question in the case, then, so far as the White Act proviso is concerned, is whether a distinction between the rights of plaintiff companies and the rights of the Karluk Village may properly be predicated on the fact that the people of Karluk Village used and claimed the beach in question long before the plaintiff companies arrived on the scene.

The allocation of preference to prior possession is nothing new in the Alaskan fisheries. Rather it is the standard practice, and nobody has ever suggested prior to the institu-

tion of this case that this practice was forbidden by the equality clause of the White Act.

To be sure the Karluk Natives did not have notarized deeds to their village sites and fishing grounds before the white man came to Alaska. They had other ways of publicizing the fact of ownership based on long continued possession, "one of the profoundest factors in human thought" (Holmes, J., in *Carino v. Insular Government of Philippine Islands*, 212 U. S. 449). But in any event the Karluk Natives' possession of the lagoon which fed them was recognized by the Russians, who "did not assume to convert all the native inhabitants into trespassers or even into tenants at will" (*ibid.* at p. 460).¹⁶ In fact, the Russian Czar ordered officials of the Russian-American Company not to

¹⁶ The attitude of the Russian Czars is explicitly stated in a memorandum prepared at the request of Secretary Seward, by State Counsellor Kostlivtsov, November 21, 1867. The following excerpt is from a translation of this memorandum found in House Executive Document, No. 177, 40th Congress, 2nd Session:

"... neither the government nor the company had any interest to interfere with the distribution of lands between the inhabitants of the Aleutian Islands. All these islands, the boundaries of which are fixed by nature itself, are held and used by the Aleuts by right of prescription, never interrupted by any foreign violation or interference. The division of lands between the Aleutian settlements was established at a time anterior to the Russian occupation and continues to be inviolably preserved according to usages prevalent of all antiquity amongst the natives."

The most important of the Aleut land holdings so recognized were the Aleut fishing grounds, according to another memorandum of November 21, 1867; from Mr. C. M. Clay, U. S. Legation, St. Petersburg, Russia to Secretary of State Seward: "... the soil itself being perfectly barren, and unfit either for agricultural or grazing purposes, there is no reason why the natives should endeavor to extend the limits of their lands; if they value their grounds, it is exclusively on account of streams abounding in fish, or of coast sites, designated by the local name of Liyda . . ."

Karluk Village fishing ground is to be protected from any enterprising Eskimo or Osage Indian who might wish to displace Karluk fishermen from their accustomed fishing places, as well as from white entrepreneurs. The only question of discrimination that is raised in fact is the question whether the protection ordinarily given to property owners—even to owners of such tenuous possessory rights as may be enjoyed by the first occupant of a fish trap site, as long as he occupies it, under the White Act regulations—shall be denied to groups which the court below has characterized as “minority groups of lesser education and initiative”. It is the plaintiffs who are seeking to establish a permanent discrimination against the Native population of Alaska and to frustrate the efforts of the Government to give them the same measure of protection that it gives to other fishermen who have had the good fortune to occupy a choice fishing ground first.

The plaintiff companies,¹⁸ acting through the Alaska Salmon Industry Inc., and able attorneys who represent them, have advised Congress that the continuance of their industry depends upon Federal recognition and protection of their possessory claims in Alaska fishing waters, claims which are based on alleged priority of use and occupancy.¹⁹ In seeking legislative confirmation of their own occupancy rights in trap sites in Alaskan waters the plaintiff com-

¹⁸ The plaintiff Libby, McNeill and Libby was the third largest claimant of fish trap sites in Alaskan coastal waters, when this suit was instituted. The plaintiff San Juan Fishing & Packing Co. was the eighth largest claimant of such sites. See Hearings before Subcommittee of Committee on Merchant Marine and Fisheries, H. R., 79th Cong., June 24, 1946, p. 6.

¹⁹ *Ibid.* pp. 3 et seq. And see testimony of attorneys for Alaska Salmon Industry Inc., in Hearings before Subcommittee of Senate Committee on Interstate and Foreign Commerce, and Subcommittee of House Committee on Merchant Marine and Fisheries, 80th Congress, 2d Session, on S. 1446 and H. R. 3859, pp. 27, 37-38, 53, 106.

panies claim to be carrying out the true purposes of the White Act.

Yet when native communities seek to rely upon a priority of occupancy that goes back not years but centuries, and the Government seeks to recognize and protect that occupancy (as it did for the occupancy rights of the Hualapai Tribe in *United States v. Santa Fe Pac. R. R.*, 314 U. S. 339), the charge of racial discrimination is raised.

Possession and the right of first occupancy are not racial matters. If nobody has any possessory or occupancy rights in the waters or tidelands of Alaska, this Court should so declare, and the fish trap sites, cannery sites, oyster beds and docks now in the possession (generally without benefit of patent) of plaintiffs and other canning companies will all revert to the public. But if any possessory rights or occupancy rights of white companies are recognized by the Federal authorities, then it is surely not discriminatory to recognize that native communities may have similar rights and that the Federal Government may protect such rights as assiduously as it protects the rights of men of other races.

Plaintiffs have tried, for many years, to persuade Presidents and Congresses to repudiate the solemn pledges under which the Native Village of Karluk holds its ancient fishing grounds. Unsuccessful in this effort,²⁰ they now ask the courts to legislate the Karluk Reserve out of existence.

²⁰ The last Congress was asked to invalidate the Karluk Reservation (S. J. Res. 162, 80th Congress), but declined to do so. Earlier Congresses had been asked to repeal the entire Wheeler-Howard Act, but also declined to do so. See S. 2103, 76th Cong.; S. 1218, 78th Cong.; S. 978, 79th Cong.

CONCLUSION.

The judgment of the court below should be reversed.

Respectfully submitted,

NATIVE VILLAGE OF KARLUK,
ALASKA NATIVE BROTHERHOOD,
NATIONAL CONGRESS OF AMERICAN
INDIANS,
ASSOCIATION ON AMERICAN INDIAN
AFFAIRS,
AMERICAN CIVIL LIBERTIES UNION,
Amici Curiae.

By Their Attorneys:

FELIX S. COHEN,
1624 Eye Street, Northwest,
Washington, D. C.

JAMES E. CURRY,
1016 - 16th Street, Northwest,
Washington, D. C.

HENRY COHEN
and
JONATHAN BINGHAM,
10 Rockefeller Plaza,
New York, New York.

OCTOBER, 1948.

APPENDIX.

AFFIDAVIT.

I, Oscar L. Chapman, Under Secretary of the Interior, first being duly sworn, depose and say:

1. I have served in the Department of the Interior as Assistant Secretary, as Under Secretary and, from time to time, as Acting Secretary since May 5, 1933;

2. On March 22, 1946, as Acting Secretary, I approved and promulgated Commercial Fishing Regulations for Alaska, including therein the following regulation, section 208.23(r):

"Sec. 208.23. *Waters closed to commercial salmon fishing.* All commercial fishing for salmon is prohibited as follows:

* * * * *

"(r) All waters within 3,000 feet of the shores of Karluk Reservation (Public Land Order No. 128, May 22, 1943), beginning at a point on the east shore of Shelikof Strait, on Kodiak Island, latitude 57° 32' 30" N., thence northeasterly along said shore to a point 57° 39' 40".

"The foregoing prohibition shall not apply to fishing by natives in possession of said reservation, nor to fishing by other persons under authority granted by said natives (49 Stat. 1250)."

3. The primary purpose of this regulation was to protect and conserve the salmon supply of the Karluk River and this regulation was adopted in the light of the following facts of record in the Department of the Interior:

(a) The Karluk River and the water area surrounding the Native Village of Karluk has long been known to constitute one of the most productive red salmon areas in the world. For many years the history of the commercial exploitation of the salmon of this area has been marked by a high rate of exploitation with little regard to the effect of such exploitation on the continuance of the salmon supply. While stocks dwindled, fish-

ing efforts redoubled in intensity, and the amount of gear in operation increased by leaps and bounds in an effort to increase the size of the commercial pack. Such practices threatened eventual depletion of the salmon supply and final extinction of the industry dependent thereon.

(b) Special regulations adopted for this area from time to time and particularly regulations abolishing traps and limiting seine fishing have alleviated the situation to some extent. However, in its most recent bulletin concerning salmon in the Karluk River, Alaska, issued in 1944, the conclusion of the Fish and Wildlife Service is that from 1888 to 1934 there has been a marked reduction in the abundance of Karluk River red salmon. (Fishery Bulletin 39). A copy of the table showing the commercial catch of Karluk River red salmon from the beginning of the commercial canning industry in 1882 to 1936 is attached.

4. Section 208.23(r) of the regulations will in my judgment help to conserve the supplies of fish in the Karluk area, to protect the dwindling salmon supply, and to create conditions which will lead to the enhancement of the supply of salmon for future consumption.

5. A special exception was included in section 208.23(r) in favor of the Natives of Karluk in view of the following facts and circumstances of record in the Department of the Interior:

(a) The Aleutian community of Karluk on Kodiak Island, Alaska, has been in existence since time immemorial and during its entire existence, the Natives of Karluk have depended for their livelihood on the salmon supply of Karluk River. When the first Russian explorers discovered this area they found the native community well established and engaged in extensive fishing activities. These natives are recorded as selling fish in large quantities to the Russians as early as 1795. The area which the Natives of Karluk have always used for their fishing surrounds the mouth of the Karluk River and the beach extending a few miles along the coast line. For the most part, the natives have fished from the beach with beach seines or more primi-

tive gear and have had to wait for the runs to come to the Karluk River to obtain their fish supplies for subsistence and trade.

(b) Since March 16, 1931, the Office of Indian Affairs has been charged with responsibility for the welfare and protection of the Natives of Karluk.

(c) During several seasons prior to 1943, the Natives of Karluk were compelled by outsiders to vacate their usual fishing area, during the fishing season, and to conduct their own fishing operations in the far corner of the lagoon known as the "Rock Dump." When the natives fished there, they used short gill nets in spaces between the rocks near the shore and snared a few salmon that happened to venture into the nets. In many cases outsiders, fishing with purse seines from boats, interfered with native efforts at beach seining and actually scooped the fish out of the beach seines of the natives.

(d) These infringements upon the fishing areas and fishing operations of the Karluk natives threatened the principal source of their income and livelihood and threatened to make them public charges of the Federal Government unless the native use of these waters was protected from such interference by outside fishermen.

(e) On March 23, 1942, the Office of Indian Affairs, through Assistant Commissioner William Zimmerman, Jr., recommended the establishment of a reservation for the natives of Karluk, pursuant to the act of May 1, 1936 (49 Stat. 1250, 48 U. S. C. sec. 358a). This recommendation included the following statements, which were carefully checked and confirmed by the General Land Office, the Fish and Wildlife Service, and other interested bureaus and offices of the Department of the Interior:

"The proposed reserve is located in the western part of Kodiak Island off the southern shore of Alaska and covers approximately 55 square miles, or 35,200 acres of land area, and the water area adjacent thereto extending 3,000 feet from the shore line at mean low tide. Kodiak Island is bordered on the north and west by Shelikof Strait, which separates it from the Alaska Peninsula. Within the area

above described is included a small tract of not to exceed 40 acres reserved for educational purposes by Executive Order of March 4, 1930.

"The native Aleuts of Karluk have been forced out of their fishing area by outsiders who are transported to their village each summer from the States. The mouth of Karluk River and the two miles of beach immediately in front of the village is the area desired and has been used by the natives of Karluk for many years. The natives are crowded out of this locality and are now forced to leave the village to work in canneries or fish in a far corner of the lagoon or beach which is known as the "rock dump". The Karluk natives have been fishing commercially in the mouth of Karluk River and lagoon since 1867 and each year they have been crowded back until their fishing area is gone. The area requested by the natives does not include any canneries but only some cannery buildings owned by the Alaska Pacific Association. The Karluk cannery has not operated since 1911.

"The natives of Karluk have organized under the provisions of the Indian Reorganization Act and are operating under their own constitution and charter. Approximately 200 native Aleuts reside at Karluk throughout the year. They are a fine group of people, eager for an education, willing to work out their own salvation, and should be given a reserve to protect them from the exploitation of outsiders. There are no inhabitants except the natives living within the requested reserve area other than a few itinerant whites.

"In addition to the fishing, which is the main industry, the proposed reserve provides good fur trapping, which is carried on as a winter occupation. The natives can also raise gardens in the fertile land back of the village. Many of the older people plant small plots in their yards that have grown unusually well."

(f) The Secretary of the Interior on May 22, 1943, established the Karluk Reservation, which reservation was ratified by the natives of Karluk on May 23, 1944. This action was taken in accordance with the foregoing recommendations and with the view of the Solicitor of the Department of the Interior that a proper basis for

the establishment of a reservation including tidelands and waters 3,000 feet from shore was to be found in the fact (a) that the proposed reservation comprised a reservation formerly under the jurisdiction of the Department of the Interior and used for village purposes by the Karluk natives, (b) that part or all of the area of the proposed reservation had been occupied by the Karluk Native Village since 1884 and long prior thereto, and (c) that any land within the proposed reservation not included within the foregoing categories was "public land adjacent thereto." Throughout the consideration of the proposed reservation the purpose of protecting the beaches and adjacent waters which constituted the native fishing areas was paramount.

(g) In accordance with the policy established by the Congress in the acts of 43 Stat. 466, 48 U. S. C. sec. 234, 57 Stat. 306, sec. 9, 48 U. S. C. sec. 198, the Department of the Interior has undertaken in the case of Karluk Reservation, as well as in other cases, to give special consideration to the needs of the natives, allowing them to fish under circumstances where nonnative fishing may be forbidden. Such exceptions are entirely consistent with a wise conservation policy, since the history of native fishing and the permanent interests of the permanent native community in maintaining a permanent supply of salmon are such as to give reasonable assurance that the amounts of fish taken by the natives themselves or by third persons operating under their direction and authority will be only such as do not endanger the continuance of the salmon supply. The natives have been advised that their activities in fishing and allowing outsiders to fish are subject to the supervision of this Department in the interests of conservation and all such action is being taken in consultation with the Department and with its approval.

(Sgd.) OSCAR L. CHAPMAN.

Sworn to before me this 3rd day of July 1946.

(Sgd.) BERNICE KIRSCHLING,

Notary Public.

(Seal)

My commission expires 12/31/47.

*Catch of Karluk River Red Salmon From Beginning of the
Canning Industry in 1882 to 1936.*

<i>Year</i>	<i>Number of Fish</i>	<i>Year</i>	<i>Number of Fish</i>
1882	58,800	1910	1,492,544
1883	188,706	1911	1,723,132
1884	282,184	1912	1,245,275
1885	468,580	1913	868,422
1886	646,100	1914	540,455
1887	1,004,500	1915	828,429
1888	2,781,100	1916	2,343,104
1889	3,411,730	1917	2,324,492
1890	3,148,796	1918	1,094,665
1891	3,500,588	1919	1,089,809
1892	2,852,458	1920	1,368,526
1893	2,909,508	1921	1,643,119
1894	3,349,976	1922	658,159
1895	2,055,984	1923	730,170
1896	2,638,976	1924	890,839
1897	2,204,425	1925	1,323,302
1898	1,534,064	1926	2,386,335
1899	1,399,117	1927	714,790
1900	2,594,774	1928	1,000,774
1901	3,985,177	1929	227,399
1902	2,981,112	1930	167,091
1903	1,319,975	1931	751,889
1904	1,638,949	1932	674,407
1905	1,787,642	1933	845,423
1906	3,382,913	1934	919,200
1907	2,929,886	1935	654,817
1908	1,608,418	1936	1,077,831
1909	923,501		